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THE PRINCIPLES OF THE LAW OF PEACE OPERATONS: A PRACTICAL FRAMEWORK FOR JUDGE ADVOCATES

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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THE PRINCIPLES OF THE LAW OF PEACE OPERATIONS: A PRACTICAL FRAMEWORK FOR JUDGE ADVOCATES

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ABSTRACT

The participation of United States military forces in Peace Operations escalated dramatically in the last decade. Commanders and staffs constantly present Judge Advocates with a large variety of legal issues. During an armed conflict, the Judge Advocate can turn to the Law of Armed Conflict (or International Humanitarian Law) to find many of the answers, or at least some general legal principles to guide the analysis. For a Judge Advocate in a peace operation, the legal structure is not so clear.

A variety of laws will apply to U.S. forces during a peace operation. These may include the Law of War, International Human Rights Law, Host Nation Law, and U.S. law and policy. A Judge Advocate on a peace operation will seldom have a legal question with a "black and white" answer in any of the applicable fields of law. Frequently, an issue may have several diverse possible legal answers, which the attorney must understand and then present in a coherent manner to the commander for a decision. Application of general legal principles for peace operations will help guide the Judge Advocate while conducting a legal analysis of the many issues presented in a peace operation.

Currently, no such list of legal principles for peace operations exists. This thesis establishes the backdrop of principles of the Law of War and other non-legal principles for peace operations. There is also a brief discussion of common issues presented to Judge Advocates in recent peace operations in Somalia, Haiti, Bosnia and Herzegovina, and Kosovo. A list of general legal principles of the Law of Peace Operations is proposed to assist as a guide for future judge advocates on peace operations along with several examples of these principles in action.

TABLE OF CONTENTS

If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.[1]

I. Introduction

One constant that a judge advocate finds in a deployed environment is meetings. These meetings concern what has happened, what should have happened, what should happen in the future, and even meetings about what is currently happening.[2] During peace operations, these meetings present many novel issues with which the attendees are not familiar.

All soldiers "know" armed conflict. At least they know what a soldier does to accomplish the mission of closing with and destroying the enemy. They also know that rules govern a soldier's conduct when accomplishing that mission. Based upon the annual training they receive, soldiers generally know the content of the Law of War.[3] Soldiers know the general principles of military necessity, humanity, distinction, and proportionality, which form the foundational principles of the Law of War. Commanders frequently look to judge advocates for their expertise regarding the Law of War. Judge advocates know this body of

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[1] Hans Lauterpacht, *The Problem of the Revision of the Law of War*, 1952 BRIT. Y.B. INT'L L. 382.

[2] The list of official names would include battle updates, intelligence updates, after action reviews, operational planning meetings, information operations meetings, and huddles.

[3] See discussion *infra* Section II regarding the history of the law of war. The terms "Law of War," "Law of Armed Conflict" and "International Humanitarian Law" generally refer to the same body of law and are used interchangeably in this thesis. All U.S. military members receive training in the Law of Armed Conflict commensurate with their duty position. U.S. DEP'T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, ¶ 5.5.1 (9 Dec. 1998) [hereinafter DOD DIR 5100.77].

law and where to look for answers. When asked a question regarding an enemy prisoner of war, judge advocates look to the Geneva Convention Relative to the Treatment of Prisoners of War.[4] When asked about medical treatment for an enemy soldier found on the battlefield, judge advocates look to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.[5] Thus, at least for judge advocates, the Law of War is a relatively known "commodity."

In a peace operation, however, the legal requirements are less clear. The laws that soldiers and judge advocates train on so frequently govern the waging of war or armed conflict, not the "waging of peace."[6] International law provides little guidance to commanders and soldiers regarding many peace operation issues. For instance, what rules apply when an international agency requests an escort for a group of civilians that wants to return to their homes in a remote area of the countryside? What rules apply when a pregnant local national stops a U.S. soldier on a patrol and requests help? U.S. law provides some guidance, but is not always directly on point. What other circumstances exist that are unique to a peace operation that a judge advocate should consider? When searching for answers to these issues, judge advocates often confront the idea that they should apply the "principles

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[4] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 142, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[5] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 63, 6 U.S.T. 3114, 75 U.N.T.S. 31.

[6] *See* Susan L. Turley, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L.R. 139, 140 (1994) (discussing in part, the operation in Somalia, which began as a humanitarian aid operation and slowly deteriorated into a peacekeeping mission and then into "a legally indeterminate conflict.").

and spirit of the law of war," but no definition of this phrase is readily available.[7] The content of this phrase has perplexed many judge advocates, often as they sit in one of those mind-numbing meetings at two o'clock in the morning and the commander looks at them and says: "OK Judge, what do you think about that?" This thesis provides an analysis of the content of the "principles and spirit of the law of war" and their application to peace operations, it also suggests an alternative set of legal principles that works as a framework that will better assist judge advocates in providing an answer to the commander that uses the necessary legal and non-legal considerations.

To achieve this purpose, the following seven sections provide a discussion of applicable law, facts from current operations, and an analysis with recommendations on applicable legal principles. Section II presents a brief history and introduction to the Law of War. Section III discusses the basic principles of military necessity, humanity, distinction, and proportionality. Section IV provides background information regarding peace operations to include some guiding principles applied to peace operations and a short discussion of four recent missions that included U.S. forces. These missions will provide the operational context for the discussion and analysis of various legal issues. Section V describes the legal structure that applies during a peace operation, and identifies sources judge advocates can consult while providing legal advice. Section VI provides information on how judge advocates have dealt with three common issues presented during peace operations and analyzes the applicability (or lack of applicability) of the principles of the Law of War to these issues. Finally, Section VII presents a list of recommended legal principles for peace

[7] *See* Major Timothy P. Buhlman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other than War*, 159 MIL. L. REV. 152, 165–66 (1999). The policy referred to is DOD DIR 5100.77, *supra* note 3, ¶ 5.3.1

operations that a judge advocate can use as a framework to analyze questions, especially when black letter law is ill defined.

II. History of the Law of War

Despite all the ambiguities surrounding the Law of War and its history, it is clear that some form of regulations governed armed conflicts to varying degrees and with varying success from the earliest recorded history. The *Holy Bible* provides one example from circa 1400 B.C. where God tells the Israelites that they could eat the fruit of the trees from an enemy's field, but they were not to destroy the trees themselves. [8] Other early sources include *The Art of War* from circa 4th Century B.C.,[9] the *Ssu-ma Fa* (*The Methods of the Minister of War*) from the Far East around the 4th Century B.C., the *Ramayana* from India in the 3d Century B.C., and the *Qur'an* written in the early 7th Century A.D.[10]

The Law of War developed along two basic prongs: the *jus in bello*, which discusses the legal and moral constraints during the conduct of armed conflict, and the *jus ad bellum*, which concerns the legal basis for the use of force.[11] In addition, the Law of War consists of

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[8] Deuteronomy 20:19-20. Date is taken from THE NEW GENEVA STUDY BIBLE, NEW KING JAMES VERSION 240 (1995).

[9] SUN TZU, THE ART OF WAR (Lionel Giles, trans., The Mil. Service Pub. Co., 1944).

[10] For a detailed discussion see L. C. Green, *Cicero and Clausewitz or Quincy Wright: The Interplay of Law and War*, 9 USAFA J. LEG. STUD. 59 (1998) [hereinafter *Interplay of Law and War*]; A.V.P. ROGERS, LAW ON THE BATTLEFIELD 1 (1996) [hereinafter LAW ON THE BATTLEFIELD].

[11] *See* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 1–2 (2d ed., 1998) [hereinafter MCCOUBREY, IHL]. This thesis only addresses the *jus in bello* prong and its application within peace operations. Application of the *jus ad bellum* to peace operations concerns the legality of humanitarian intervention and is outside the scope of this thesis. Many

three general bodies of written agreements: the Geneva Law and conventions that address certain weapons (which generally presents the *jus in bello),* and the Hague Law, (which generally covers the *jus ad bellum).*[12]

The first of these written agreements, referred to as the Geneva Law, began with the Geneva Convention of 1864.[13] Revisions to this Convention followed in 1906[14] and 1929.[15] Following World War II, delegates met again in Geneva and agreed upon the four Geneva Conventions of 1949, which currently provide the majority of the law in this area.[16] The last of these conventions was the most innovative and dealt with the treatment of civilians as a direct consequence of the suffering of civilian populations in occupied territories and was an attempt to protect civilians during an actual armed conflict or occupation by enemy forces. Due to the changing nature of "modern" armed conflict, the Swiss Government invited the international community to Geneva again in 1974 to review a draft of proposals related to the

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resources exists that discuss he legality of humanitarian intervention. *See, e.g.,* THOMAS G. WEISS, MILITARY – CIVILIAN INTERACTIONS: INTERVENING IN HUMANITARIAN CRISES (1999); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich, ed., 1973).

[12] This is not an absolute division and each body of law contributes to both prongs of the Law of War.

[13] Convention for the Amelioration of the Condition of the Wounded on the Field of Battle, Aug. 22, 1864, T.S. No. 377, 1 Bevans 7.

[14] Convention of the Amelioration of the Condition of the Wounded and Sick on the Field of Battle, Jul. 6, 1906, T.S. No. 464, 1 Bevans 516.

[15] Convention of the Amelioration of the Condition of the Wounded and Sick on the Field of Battle, Jul. 27, 1929, T.S. No. 847, 2 Bevans 965.

[16] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV].

law of armed conflict.[17] Three years later, the delegates agreed upon the two Additional Protocols of 1977.[18] The "Geneva Law" constitutes the body of humanitarian law concerning the treatment and protection of *hors de combat*,[19] civilians, and other non-combatants.[20] With the notable exception of portions of the 1977 Protocols, this body of laws is customary international law and is, therefore, applicable to all states and not just the signatories to the specific treaties/conventions.[21]

The second body of law regulating activities in armed conflict arises from the set of international agreements addressing weaponry. The Declaration of Saint Petersburg, which prohibited the use of any projectile weighing less than 400 grams that was either "explosive or charged with fulminating or inflammable substances,"[22] was the first in a long line of this

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[17] L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 48 (1993) [hereinafter GREEN, LOAC].

[18] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[19] Defined as members of the armed forces who are not participating in the armed conflict due to sickness, wounds, detention, or any other cause. *See, e.g.*, MCCOUBREY, IHL, *supra* note 11, at 1–2.

[20] GREEN, LOAC, *supra* note 17, at 28-29.

[21] The 1977 Protocols not only updates the Law of War, but also makes several fundamental changes to the law as it existed at that time. For example, it attempts to categorize struggles conducted by national liberation movements for the purpose of self-determination as international conflicts and changes the definition of combatants. Unofficial compilations on U.S. views can be founding Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. AND POL. 419 (1987); Abraham D. Sofaer, Agora: *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AM. J. INT'L L. 784 (1988). Many provisions of the 1977 Additional Protocols I and II to the Geneva Conventions of 1949 have risen to the level of customary international law and therefore part of the law of war. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 62-70, 75-78 (1989).

[22] Declaration Renouncing the Use, In Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29, 1868, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 95 (Dietrich Schindler & Jiri Toman eds., 1981) [hereinafter LAWS OF ARMED CONFLICTS].

type of international agreement. Many other examples of such treaties and conventions exist and address items such as poisonous gases, mines, and various other conventional weapons.[23]

The third body of law governing armed conflicts concerns the various means and methods of conducting actual military operations during the conflict. Many refer to this body of law as the "Law of the Hague" or the "Hague Law" even though its genesis was a conference in Brussels in 1874, which occurred at the request of Czar Alexander II of Russia.[24] Twenty-five years later, the Czar again invited states to a conference to adopt an international agreement concerning the conduct of hostilities. The result was the Hague Regulations of 1899.[25] One of the most important of the documents produced at the 1899 conference was the Convention (II) with Respect to the Laws and Customs of War on Land and its Annex.[26] The delegates, however, specifically stated that the enumerated rules were not all inclusive and to the extent that something was not mentioned, customary law would continue to control.[27] Delegates held a subsequent conference at The Hague in 1907. This subsequent conference reiterated several points from the 1899 conference and adopted

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[23] *See, e.g.*, Protocol for the prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, Jun. 17, 1925, 26 U.S.T. 571; Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, *reprinted in* 19 I.L.M. 1523 (1980); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (1993).

[24] GREEN, LOAC, *supra* note 17, at 29.

[25] Declaration (IV, 2) Concerning Asphyxiating Gases, Jul. 29, 1899, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 22, at 105; Declaration (IV, 3) Concerning Expanding Bullets, Jul. 29 1899, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 22, at 109; *see also* GREEN, LOAC, *supra* note 17, at 31.

[26] LAWS OF ARMED CONFLICTS, *supra* note 22, at 63.

[27] This was accomplished in the Martens Clause, see discussion *infra* Section III(B).

numerous other Conventions concerning the conduct of warfare, including the opening of hostilities.[28] As with the Geneva Law, much of the Hague Law is now customary international law.[29]

While the Geneva Law, the agreements on various weaponry, and the Law of the Hague attempted to define and codify customary international law, they did not reach the level of clarity necessary for a compete and practical application of these laws in all armed conflicts. Nations must still interpret imprecise definitions, such as the required level of "direct involvement" of civilians for targeting purposes found in Protocol I.[30] Realpolitik was a factor then and continues to be important, for as Professor Lauterpacht once said: "the Conventions, beneficent as they are, abound in gaps, compromises, obscurities and somewhat nominal provisions resulting from the inability of the parties to achieve an agreed effective solution – occasionally to the point of the English and French texts laying down divergent

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[28] Convention (I) Relative to the Pacific Settlement of International Disputes, Oct. 18, 1907, T.S. No. 536, 1 Bevans 577; Convention (II) relative to the Limitation of Employment of Force for Recovery of Contract Debts, Oct. 18, 1907, T.S. No. 537, 1 Bevans 607; Convention (III) Relative to the Opening of Hostilities. Oct. 18, 1907, T.S. No. 538, 1 Bevans 619; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, T.S. No. 539 [hereinafter Hague IV], 1 Bevans 631 [hereinafter Hague IV]; Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. Oct. 18, 1907, T.S. No. 540, 1 Bevans 654; Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, T.S. No. 541, 1 Bevans 669; Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, T.S. No. 542, 1 Bevans 681; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. Oct. 18, 1907, T.S. No. 543, 1 Bevans 694; Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, T.S. No. 544, 1 Bevans 711; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, T.S. No. 545, 1 Bevans 723.

[29] GREEN, LOAC, *supra* note 17, at 32.

[30] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 618 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON PROTOCOLS].

rules."[31] These ambiguities force judge advocates to examine the underlying "principles and spirit" of the Law of War to help resolve the questions that the Conventions do not clearly answer.

III. General Principles of the Law of War

The compilation of a list of "principles" of the Law of War is an imprecise art at best. The list might include only a few basic principles or an exhaustive list of concepts related to this body of law.[32] Four primary principles form the true foundation of the Law of War. These principles, which are based firmly on customary law, are military necessity, humanity, distinction and proportionality."[33]

A. Military Necessity

The first principle considers the most fundamental issue, whether the proposed action is truly necessary. The official definition of military necessity for the U.S. Army is:

> The law of war . . . requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military

[31] Lauterpacht, *supra* note 1, at 380.

[32] *See* International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17; Buhlman, *supra* note 7 at 170–71. Practicality requires the limitation of proposed principles to the four discussed below. Other possible principles include the protection of cultural property, International and Operational Law Note, *Principle 6: Protection of Cultural Property During Expeditionary Operations Other Than War*, ARMY LAW., March 1999, at 25, and protecting the force from unlawful belligerents, International and Operational Law Note, *Principle 5: Protecting the Force from Unlawful Belligerents*, ARMY LAW., February 1999, at 26.

[33] *See e.g.*, LAW ON THE BATTLEFIELD, *supra* note 10, at 3.

> purposes and that they conduct hostilities with regard for the principles of humanity and chivalry. The prohibitory effect of the law of war is not minimized by military necessity, which justifies those measures not forbidden by international law, which are indispensable for securing the complete submission of the enemy as soon as possible.[34]

This principle allows a combatant to focus destructive combat power only at those items that are a part of or contribute to the enemy's war-making capability.[35]

In the first modern codification of the rules governing armed conflict, Dr. Francis Lieber defined military necessity as "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern laws and usages of war."[36] According to one scholar, the Lieber Code's greatest theoretical contribution to the modern law of war was its identification of military necessity as a general legal principle to limit violence in the absence of any other rule.[37]

Only a few years later in 1868, the Declaration of Saint Petersburg stated that "[t]he only legitimate object which states should endeavour to accomplish in war is to weaken the military forces of the enemy and that for this purpose it is sufficient to disable the greatest

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[34] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 3-4 (July 1956) [hereinafter FM 27-10].

[35] *See* International and Operational Law Note, *Principle 1: Military Necessity*, 1998 ARMY LAW., July 1998, at 72 [hereinafter *Principle 1: Military Necessity*].

[36] U.S. War Dep't., Adjutant Gen. Office, Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field, art. 14 (Apr. 24, 1863), *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 22, at 6 [hereinafter Lieber Code].

[37] Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 213 (1998).

possible number of men."[38] This tradition has continued through many significant Law of War treaties. In 1907, the Forth Hague Convention stated "[i]n addition to the prohibitions provided by special Conventions, it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure is imperatively demanded by the necessities of war."[39] In 1977, Protocol I also included this principle by stating that:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military actions and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[40]

A danger arises in the application of this doctrine due to the subjectivity of the analysis. For example, Prussia adopted the Lieber Code in 1870, which scholars call one of the early triumphs of the code as a restraint on behavior in war.[41] Within thirty years, however, Prussia had expanded military necessity into the doctrine of *Kriegsraison*.[42] Numerous defendants in war crimes trials have raised the doctrine of military necessity as a defense, but Courts have consistently rejected such an extreme application.[43] The doctrine of military

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[38] Declaration Renouncing the Use, In Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29, 1868, pmbl., *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 22, at 95 [hereinafter Saint Petersburg Declaration].

[39] Hague IV, *supra* note 28, art.23(g).

[40] Protocol 1, *supra* note 18, art. 52(2).

[41] Carnahan, *supra* note 37, at 218.

[42] This doctrine stated that the necessities of war take precedence over the rules of war. *See* COMMENTARY ON PROTOCOLS, *supra* note 30, at 391; *see also* Carnahan, *supra* note 37, at 218; JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 351-52 (1954)); *Principle 1: Military Necessity*, *supra* note 35, at 72.

[43] The judgment against List remains one of the most forceful modern precedents rejecting military necessity as a defense to war crimes.

> According to *kriegsraison,* the so-called reprisal killings at Sabac and elsewhere were necessary to pacify the resistance movement that was spreading throughout the Balkans in the

necessity recognizes that certain actions are required to accomplish a military mission during an armed conflict, but this principle does not operate in a vacuum and commanders must still apply the other laws of armed conflict.[44]

B. Humanity

Like military necessity, the principle of humanity is also firmly rooted in the history of the Law of War and finds expression in almost every major treaty and convention dealing with the *jus in bello.*[45] This principle relates to other aspects of the Law of War and serves to minimize the unnecessary suffering of those affected by the armed conflict.[46] The desire to

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> fall of 1941 and that was tying down German units needed at the front lines. The court rejected the defense, stating: "the rules of international law must be followed even if it results in the loss of a battle or even a war.

Mark S. Martins, *"War Crimes" During Operations Other than War: Military Doctrine and Law Fifty Years After Nuremberg—and Beyond,* 149 MIL. L. REV. 145, 154 (Summer, 1995) (citing United States v. List (Hostages Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1272 (1948)). The doctrine of military necessity, however, must be distinguished from absolute necessity or *force majeure*, either of which might, in principle, excuse violation of any positive rule of international law. *Id.* at 153.

[44] One scholar who stated the following recognized this distinction:

> [Military Necessity is defined as] a doctrine within the laws of armed conflict which recognizes the potential impracticability of full compliance with legal norms in certain circumstances, and accordingly, may mitigate or expunge culpability for prima facie unlawful actions in appropriate cases in armed conflict. Its precise effects in any given case will rest upon the combination of issues of circumstances, fact and degree and the strength of the claims of the norms concerned. The effect of the doctrine is limited to particular events and circumstances and does not have a general suspensory effect upon the law of armed conflict

LAW ON THE BATTLEFIELD, *supra* note 10, at 6 n.35.

[45] *See* Shigeki Miyazaki, *The Martens Clause and International Humanitarian Law, in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET (Christophe Swinarski ed., 1984); Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering*, 299 Int'l Rev. Red Cross 98 (1994).

[46] *See* International and Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov. 1998, at 50 [hereinafter *Principle 4: Preventing Unnecessary Suffering*].

prevent unnecessary suffering is, in fact, the primary purpose of the entire body of the Law of War.[47]

The most famous expression of this principle is in the preamble to the Hague Convention (IV) of 1907, commonly referred to as the Martens Clause:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[48]

Since that time, the War Crimes Tribunal in Nuremberg, the International Court of Justice and many other human rights bodies have relied upon this principle.[49] Similar wording has also been included in 1949 Geneva Conventions,[50] the 1977 Additional Protocol I,[51] and the Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.[52]

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[47] FM 27-10, *supra* note 34, at 3

[48] Hague IV, *supra* note 28, at pmbl. This preamble is called the "Martens Clause" because the drafter was Professor De Martens of the University of St. Petersburg. The clause provides that in cases not covered by the attached regulations, the belligerents remain under the protection and the rule of the principles of the law of nations. According to Martens, these rules developed from the usages established among civilized people, the laws of humanity, and the dictates of the public conscience. LAW ON THE BATTLEFIELD, *supra* note 10, at 7.

[49] Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience in Symposium: The Hague Peace Conferences*, 94 AM. J. INT'L L. 78, 78 (2000) [hereinafter *The Martens Clause*].

[50] GC I, *supra* note 16, art. 63; GC II, *supra* note 16, art. 62; GC III, *supra* note 16, art. 142; GC IV, *supra* note 16, art. 158.

[51] Protocol I, *supra* note 18, art. 1.

[52] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, pmbl. ¶ 5, 1342 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter Conventional Weapons Convention].

The principle of humanity may appear inconsistent with military necessity and the legitimate object during war to destroy and defeat the enemy. Since 1868, however, the Law of War has specifically included the notion that military necessity only justifies the infliction of as much suffering as is necessary to bring about the submission of the enemy.[53] There is necessarily a subjective analysis and a balancing of requirements and this principle provides one of the considerations competing against military necessity.[54]

Protocol I contains two provisions that codify the principle of humanity. First, it states that in "any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited."[55] The next paragraph also prohibits the employment of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."[56] This statement recognizes the dynamic element of the principle of humanity, which proclaims the applicability of the principles mentioned regardless of differing situations or evolving technology.[57]

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[53] *See* Saint Petersburg Declaration, *supra* note 38.

[54] *See Principle 4: Preventing Unnecessary Suffering, supra* note 46, at 51.

[55] Protocol I, *supra* note 18, art. 35(1).

[56] *Id.* art. 35(2).

[57] COMMENTARY ON PROTOCOLS, *supra* note 30, at 39. Judge Shahabuddeen reiterated this position in the International Court of Justice's Advisory Opinion on *Nuclear Weapons*. He stated:

> In effect, the Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community. The principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another.

C. Distinction

The next principle is distinction, which is a "cardinal" principle of the Law of War.[58] The principle of distinction requires the military to distinguish between combatants who are lawful targets and the civilian population. Historically, the separation of combatants from innocent civilians varied widely, but this was rarely a significant issue because combat (other than a siege) often occurred far from population centers. One early example of this principle occurred in 1054 when the Council of Narbonne decreed the following:

> [T]here should be no attack on clerics, monks, nuns, women, pilgrims, merchants, peasants, visitors to councils, churches and their surrounding grounds to thirty feet (provided they did not house arms), cemeteries and cloisters to sixty feet, the lands of the clergy, shepherds and their flocks, agricultural animals, wagons in the field, and olive trees.[59]

The principle of distinction developed as a customary practice during warfare and was included as a key element of the first modern comprehensive code of regulations concerning armed conflict, the Lieber Code. In 1863, Dr. Lieber wrote:

> [A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself,

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Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 406 (July 8) (Shahabuddeen, J., dissenting). *See The Martens Clause, supra* note 49, at 78.

[58] *See* International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., August 1998, at 35 (citing Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, *reprinted in* 35 I.L.M. 809, 827 (1996)) [hereinafter *Principle 2: Distinction*]; International and Operational Law Note, *Principle 7: Distinction Part II*, ARMY LAW., June 1999, at 35 [*Principle 7: Distinction Part II*].

[59] *Interplay of Law and War, supra* note 10, at 73 (citing CHRISTIAN BAINTON, ATTITUDE TOWARD WAR AND PEACE 110 (1960)).

> with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.[60]

Distinction in war has appeared in various forms over the centuries and is subject to some ambiguities based on definitions of the terms and differing views of the extent of the prohibition.[61] Even within the last sixty years, this principle has undergone changes that have significantly affected the targeting process.[62] The current internationally accepted definition makes clear that the parties to a conflict "shall direct their operations against military objectives."[63] There is also a requirement to ensure respect for and the protection of the civilian population and civilian property, and a prohibition on any attacks on civilians or the civilian population as such, including acts or threats of violence with the intent to spread terror among the civilian population.[64] "Parties must clearly distinguish between civilians, their property and military objectives."[65]

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[60] Lieber Code, *supra* note 36, at 3.

[61] *See* Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE H.R. & DEV. L.J. 143 (1999).

[62] For a discussion of the evolution of this principle after World War II, see LAW ON THE BATTLEFIELD, *supra* note 10, at 10–14; W. Hays Parks, *Air War and the Law of War*, 32 A.F. LAW REV. 1 (1990).

[63] Protocol I, *supra* note 18, art. 48 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."). The Commentary for Protocol I clarifies this rule and states that this principle is the "foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives." COMMENTARY ON PROTOCOLS, *supra* note 30, at 598. This was the first explicit articulation of this principle in a multi-lateral treaty. *Principle 2: Distinction*, *supra* note 58, at 36.

[64] Protocol I, *supra* note 18, art. 51(2).

[65] *Id.* art. 51(4)(a) (establishing a prohibition on indiscriminate attacks, which it defines as those attacks "which are not directed at a specific military objective").

A fundamental issue arises from the commonly accepted definition of distinction: the definition of a military objective.[66] Protocol I defines a military objective as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstance ruling at the time, offers a definite military advantage."[67] The interaction between the principle of distinction and the definition of a military objective makes the two almost inseparable, especially when analyzing the legitimacy of a proposed target. "The true essence of the principle of distinction, as implemented by the 'military objective' rule, is that combatants in any situation must constantly endeavor to ensure that warlike acts are not directed against anyone or anything that does not qualify as a legitimate target."[68]

D. Proportionality

The final principle of the Law of War is proportionality. Within the *jus in bello,* the principle of proportionality yields two rules. Both rules are founded on the notions that belligerents do not have an unlimited choice of means to defeat an enemy and that the sole object of an attack should be to destroy or defeat the enemy forces.[69] The first rule, which

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[66] For a detailed discussion, see Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict, in* THE LAW OF MILITARY OPERATIONS 197 (Michael N. Schmitt ed., 1998).

[67] Protocol I, *supra* note 18, art.52(2). For examples of these four distinct categories, *see* Robertson, *supra* note 66, at 208–09. Some locations are never a legitimate military target unless misused by the enemy, such as historic monuments, works of art, or places of worship, which constitute the cultural or spiritual heritage of peoples. Protocol I, *supra* note 18, art. 53(a).

[68] *Principle 2: Distinction*, *supra* note 58, at 37.

[69] For related discussion, see *supra* Section III(A).

relates to combatants, requires the use of force to be proportionate to the military objective.[70] The second rule requires that any incidental damage to civilians cannot be excessive in relation to the military advantage gained. After World War II, the second rule has almost become the exclusive focus of the principle of proportionality.[71]

The principle of proportionality now exists as both customary and conventional law.[72] Commanders must consider expected incidental loss of civilian life, injury to civilians, or damage to civilian property and stop any attack where the impact on the civilians is excessive in relation to the "concrete and direct military advantage anticipated."[73] Protocol I also requires commanders to perform a similar analysis during the planning phase of operations.[74]

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[70] The military also translated this rule into the principle of economy of force. THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 3 (Michael Howard, George J. Andreopoulos, & Mark R. Schulman eds., 1994) [hereinafter CONSTRAINTS ON WARFARE].

[71] *See* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 400 (1993) (With the advent of aerial warfare, civilians became extremely vulnerable and were inevitably collateral targets, which shifted the primary focus of proportionality was to civilian losses.). Since 1945, one focus of law of war has been on improving the protection of civilians. *See also* Geoffrey Best, *Restraints on War on Land Before 1945, in* RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICTS 17, 27 (Michael Howard ed., 1979).

[72] *See, e.g., id.* at 394. For a broader discussion of the principle of proportionality, see International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 55 [hereinafter *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*].

[73] Protocol I, *supra* note 18, art. 51(5)(b) ("Among others, the following types of attacks are to be considered as indiscriminate: an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."). Note the differing use of the word "indiscriminate" in this context. This notion is distinct from the principle of distinction discussed above in section III(C). *See* Gardam, *supra* note 71; W. Hays Parks, *Air War and the Law of War*, 31 A.F. LAW REV. 1 (1990); *see also* Hans Blix, *Area Bombardment: Rules and Reasons*, 49 BRIT. Y.B.INT'L L. 31, 46 (1978).

[74] Protocol I, *supra* note 18, at art. 57(2)(a)(iii).

> With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

While the word "proportionality" does not appear in Protocol I, the analysis that requires the balancing of the military objective with excessive civilian casualties embodies this principle.

The application of proportionality is much more difficult than stating it. This occurs because of the uneasy comparison between unlike quantities and values: "innocent human lives as opposed to capturing a particular military objective such as a hill."[75] This subjective analysis, however, necessarily follows from the very nature of warfare.

IV. Peace Operations

During the last ten years, U.S. military operations have not been in armed conflicts, but peace operations. The pace of these operations is ever increasing. From 1948 through January 1, 2001, the United Nations (U.N.) has conducted fifty-four peace operations, fifteen of which are currently ongoing as of March 2001.[76] Many of these peace operations involved

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Id.

> This provision codifies the customary rule of proportionality, which requires a commander to desist from attacking a legitimate military objective by the use of weapons or otherwise in a manner that would be likely to involve collateral civilian injury too great to be justified by the anticipated concrete and direct military advantage. While this is a difficult balance to assess, the mere requirement that a commander make the balance is an important safeguard.

George H. Aldrich, *The Laws of War on Land in Symposium: The Hague Peace Conferences*, 94 AM. J. INT'L L. 42, 52 (2000).

[75] Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 94–95 (1982). Lieutenant Colonel Fenrick points out that there have been no comprehensive studies of proportionality in combat, but offers two studies which provide some information: Brown, *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification,* CORNELL INT'L L.J. 134 (1976); Kruger-Sprengel, *The Concept of Proportionality in the Context of the Law of War: Report to the Committee for the Protection of Human Life in Armed Conflict, in* VIII CONGRESS OF THE INTERNATIONAL SOCIETY FOR MILITARY LAW AND THE LAW OF WAR (Ankara 1979).

[76] United Nations, *Fact Sheet, United Nations Peacekeeping Operations*, at http://www.un.org/Depts/dpko/

U.S. forces to varying degrees. The U.S. participation in peace operations can take three different forms: unilateral U.S. operations, multinational operations with the U.S. as the lead nation, and multinational operations with the U.S. as a participant or in a support role only.[77] Despite the popular use of the term, based on U.S. doctrine the U.S. forces involved in these missions were not necessarily on "peacekeeping" missions.

According to current U.S. doctrine, "peace operations" is "a broad term that encompasses peacekeeping operations and peace enforcement operations conducted in support of diplomatic efforts to establish and maintain peace."[78] This definition requires an understanding of the terms "peacekeeping" and "peace enforcement." The Department of Defense defines peacekeeping as "[m]ilitary operations undertaken with the consent of all major parties to a dispute, designed to monitor and facilitate implementation of an agreement (e.g., ceasefire, truce, or other such agreement) and support diplomatic efforts to reach a long-term political settlement."[79] Peace enforcement operations are defined as the "[a]pplication of military force, or the threat of its use, normally pursuant to international

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kpko/ques.htm (last visited 27 Mar. 1999).

[77] U.S. DEP'T OF DEFENSE, JOINT PUBLICATION 3-07.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACE OPERATIONS I-20 (Feb. 1999) [hereinafter JT PUB 3-07.3]. Under all situations, however, U.S. forces will report to the U.S. National Command Authority, however, in a multinational peace operation, U.S. forces may also report to the sponsoring organization, i.e. the United Nations or the North Atlantic Treaty Organization. *Id.*

[78] U.S. DEPARTMENT OF DEFENSE, JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 347(Mar. 23, 1994 as amended through Sep. 1, 2000) [hereinafter JT PUB 1-02].

[79] *Id.*

authorization, to compel compliance with resolutions or sanctions designed to maintain or restore peace and order."[80]

Peacekeeping operations and peace enforcement operations are not part of a continuum, but occur under different circumstances characterized by three critical factors: consent, impartiality, and the use of force.[81] Consent is evident where the parties to the conflict demonstrate a willingness to accomplish the goals of the operation. The mandate for the mission often states these goals. In a peacekeeping operation, the initial consent of the major parties is a requirement. In peace enforcement operations, however, consent of the parties is not required, even though some may offer it.[82] United States military forces on a peace enforcement operation have the mandate to require compliance and the military means to accomplish it, thus distinguishing a peace enforcement operation from a peacekeeping operation.[83]

Impartiality requires U.S. military forces on a peace operation to treat all sides to the conflict in a fair manner without regard to whether a party is an aggressor or a victim. The conduct, not the identity of the actor, must be the basis for reaction by the military.

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[80] *Id.*

[81] JT PUB 3-07.3, *supra* note 77, viii. This Joint Publication provides the foundation for this paragraph in order to delineate the U.S. military's position regarding these operations, which will set the proper context for the following discussion of legal issues.

[82] *Id.* at III-2. Consent in a peace enforcement operation could not be more extensive that than reached in Bosnia and Herzegovina. *See* CENTER FOR LAW AND MILITARY OPERATIONS, U.S. ARMY, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995–1998: LESSONS LEARNED FOR JUDGE ADVOCATES 77 (1998) [hereinafter BALKAN LESSONS LEARNED].

[83] The difference derives from the authority to require compliance, not the existence of *de facto* consent by a party.

Impartiality differs from equal treatment, but impartiality has the same level of importance in peacekeeping operations and peace enforcement operations. "The central 'goal' of a peace enforcement operation is achievement of the mandate, not maintenance of impartiality. While impartiality is desirable, it may be extremely difficult to attain and maintain in an actual peace enforcement operation, no matter how the force executes its mission."[84].

The final distinguishing factor between a peacekeeping operation and a peace enforcement operation lies in the use of force. Both types of operations may include the use of force, but the difference lies in the purpose for that use of force. In a peacekeeping operation, the use of force is for self-defense only. During a peace enforcement operation, the military may use armed force to compel or coerce compliance with the mandate's requirements in addition to self-defense.

While these two types of operations are quite distinct, U.S. forces may find that one mission can change from one into the other, and they must be able to react accordingly. This situation occurred in Somalia, which began as a humanitarian mission focused on providing supplies to suffering Somalis but evolved into a mission focused on establishing a secure environment. This change in mission significantly altered the paradigm that the U.S. forces needed to use in trying to accomplish the mission.[85]

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[84] JT PUB 3-07.3, *supra* note 77, at I-10.

[85] See discussion *infra* Section IV(B)(1).

A. General Principles of Peace Operations

Keeping in mind the three critical factors of consent, impartiality, and the use of force, numerous organizations have attempted to assist peacekeepers by delineating a more comprehensive list of general principles of peace operations. The International Committee of the Red Cross (ICRC) and the U.S. Department of Defense provide two representative lists.

The ICRC held a Symposium on Humanitarian and Peacekeeping Operations in Geneva on 22 – 24 June 1994.[86] One of the working groups at the Symposium had the task of developing a list of guiding principles for humanitarian activities during a peacekeeping operation. The list approved by the working group included consent, neutrality, and effectiveness.[87] They also added the principles of "clarity of the mandate" and "rules of engagement" when the use of military force was at issue.[88]

Other scholars at the ICRC Symposium mirrored the list from the U.S. Department of Defense's Joint Publication on Military Operations Other than War.[89] Mr. Toni Pfanner, Head of the Legal Division for the ICRC, stated that consent, use of force, and impartiality are the three distinguishing principles of peacekeeping operations.[90] He told those at the

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[86] *See* REPORT OF THE SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS, GENEVA, 22–24 JUNE 1994 (Umesh Palwankar ed., 1994) [hereinafter ICRC SYMPOSIUM].

[87] *Id.* at 79 (Report of Working Group 2). There was also some discussion regarding the use of the term neutrality versus impartiality between members of the ICRC and the United Nations. *Id.*

[88] *Id.*

[89] *See supra* note 81 and accompanying text.

[90] ICRC SYMPOSIUM, *supra* note 86, at 53.

Symposium that consent is indispensable and distinguishes peacekeeping operations from peace enforcement operations.[91] Mr. Pfanner also proffered the idea that the use of force is much more limited in a peacekeeping operation than in a peace enforcement operation. He reiterated, however, that the U.N. has interpreted the use of force during a peacekeeping operation to include "resistance to any attempt, by forceful means, to prevent it [the peacekeeping force] from discharging its duties."[92] He also tied consent, use of force, and the need to have clarity between peacekeeping operations and peace enforcement operations when he stated: "If there is constant defiance, then peacekeeping forces have the choice of ineffectiveness and enforcement by military means of their mandate, thereby overriding the lack of consent."[93] Finally, he believed impartiality played a key role in a successful peacekeeping operation and that it was vital to the continued cooperation of the parties. He recognized that impartiality is "a matter of practice and perception."[94]

The U.S. military provides another list of principles for use in peace operations. Current doctrine states that the six principles of Military Operations Other Than War guide peace operations.[95] It recognizes, however, that "[t]he principles of war should also be considered

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[91] *Id.* (statement by Mr. Toni Pfanner, Head of the Legal Division, ICRC).

[92] *Id.* at 54 (statement by Mr. Toni Pfanner, Head of the Legal Division, ICRC, referring to U.N. Doc S/11052/Rev.1 ¶ 4.a., (27 Oct. 1973)). He noted, however, that interpretation was to include bandits or individuals and would likely apply differently if against systematic resistance by a government. *Id.*

[93] ICRC SYMPOSIUM, *supra* note 86, at 53 (statement by Mr. Toni Pfanner, Head of the Legal Division, ICRC).

[94] *Id.*

[95] "Operations that encompass the use of military capabilities across the range of military operations short of war. These military actions can be applied to complement any combination of the other instruments of national power and occur before, during, and after war." JT PUB 1-02, *supra* note 78, at 294.

in the peace operation where combat actions are possible."[96] These six principles are: objective, unity of effort, security, restraint, perseverance, and legitimacy.[97]

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[96] JT PUB 3-07.3, *supra* note 77, at I-6.

[97] U.S. DEP'T OF DEFENSE, JOINT PUBLICATION 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR (Jun 1995) [hereinafter JT PUB 3-07].

> *Objective.* A clearly defined and attainable objective—with a precise understanding of what constitutes success—is critical when the United States is involved in operations other than war. Military commanders should also understand what specific conditions could result in mission termination as well as those that yield failure.
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> *Unity of effort.* The principle of unity of command in war is difficult to attain in operations other than war. In these operations, other government agencies may often have the lead, with nongovernmental organizations and humanitarian relief organizations playing important roles as well. Command arrangements may often be only loosely defined and many times will not involve command authority, as we in the military customarily understand it. Commanders must seek an atmosphere of cooperation to achieve objectives by unity of effort.
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> *Security.* Nothing about peace operations changes the moral and legal responsibility of commanders at every level to take whatever actions are required to protect their forces from any threat. Inherent in this responsibility is the need to be capable of a rapid transition from normal operations to combat whenever the need arises. However, what makes this responsibility especially challenging in peace operations is the balance that must be struck with "restraint."
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> *Restraint.* Because the restoration of peace rather than a clearly defined military victory is the basic objective of these operations, military force must be applied with great caution and foresight. The restraints on weaponry, tactics, and levels of violence that characterize this environment must be clearly understood by each individual service member. Rules of engagement (ROE) are standard military procedures, but in peace operations, they will often be more restrictive, detailed, and sensitive to political concerns than in war. They may also change frequently.
>
> *Perseverance.* Peace operations may require years to achieve the desired effects because the underlying causes of confrontation and conflict rarely have a clear beginning or a decisive resolution. Although this is a principle often tied to debates about U.S. long-term commitments, its operational application is that commanders must balance their desire to attain objectives quickly with a sensitivity for the long-term strategic aims that may impose some limitations on operations.
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> *Legitimacy.* Legitimacy is a function of effective control over territory, the consent of the governed, and compliance with certain international standards. Each of these factors governs the actions not only of governments but also of peacekeepers—whose presence in a country depends on the perception that there is a legitimate reason for them to be there. During operations where a government does not exist, peacekeepers must avoid actions that would effectively confer legitimacy on one individual or organization at the expense of another. Because every military move will inevitably affect the local political situation, peacekeepers must learn how to conduct operations without appearing to take sides in internal disputes between competing factions.

B. Recent Peace Operations

Of the numerous peace operations involving U.S. forces, four present a good representation of the diversity of possible circumstances. Each of these operations presented the judge advocates with issues where the applicability of the "principles and spirit" of the Law of War along with the general principles of military operations other than war have been put to the test. These missions include Somalia, Haiti, Bosnia and Herzegovina, and Kosovo.

1. Somalia

Political instability has ravaged the land and the people of Somalia from 1960 when two Italian and British colonial territories united to become an independent Somalia.[98] Border disputes with Ethiopia along with civil war added to the volatility during the ensuing years. The civil war centered around more than fourteen clans and factions that make up Somali society, all of which fought for control of their own territory.[99] When the regime of Siad Barre fell in 1991, the political situation worsened as the northern clans attempted to secede. The addition of a serious drought in the early 1990's provided a disastrous mix for the people of Somalia. By 1992, almost 4.5 million people, over half of the population, faced

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Id. at II-1 to II-5.

[98] UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING 287 (3d ed., 1996) [hereinafter BLUE HELMETS].

[99] KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED 13 (1995).

starvation, severe malnutrition, and related diseases.[100] The extended fighting in Somalia destroyed all institutions of government and at least sixty per cent of the country's basic infrastructure.[101] This combination quickly gained the attention of the world community, but the lawlessness of the country continuously thwarted efforts by the international community to help the plight of the Somalis.

The U.N. dispatched a technical team to Somalia to negotiate with the two primary clan leaders, General Mohammad Farah Aideed and Mr. Ali Mahdi. Finally on 27 – 28 March 1992, these men signed agreements in Mogadishu consenting to the deployment of U.N. observers to monitor the cease-fire and a U.N. security detachment to protect the other U.N. personnel and safeguard their efforts to provide humanitarian relief.[102] In April 1992, the U.N. Security Council approved Resolution 751, which authorized the deployment of U.N. observers to monitor the ceasefire, thus establishing the United Nations Operation in Somalia (UNOSOM).[103]

After several months of negotiations with the clan leaders, the first group of U.N. security personnel arrived in Somalia on 14 September 1992.[104] The stated mission of UNOSOM was to provide humanitarian aid and facilitate the end of hostilities in Somalia. Based upon the drastic situation in the country, the U.N. asked for increased support from the world

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[100] BLUE HELMETS, *supra* note 98, at 287.

[101] *Id.* at 288.

[102] *Id.* at 290.

[103] S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg., U.N. Doc. S/Res/751 (24 Apr. 1992).

[104] BLUE HELMETS, *supra* note 98, at 292.

community. President George H.W. Bush answered this call by ordering U.S. forces to support the U.N. under Operation Provide Relief. During this time, a daily average of 20 air sorties delivered approximately 150 metric tons of supplies to the Somali people. In total, the airlift brought in over 28,000 metric tons of critically needed relief supplies.[105]

Despite the ongoing humanitarian efforts, the security of the environment continued to deteriorate such that U.N. forces faced armed attacks and continuous confrontations by the Somali clans.[106] On 3 December 1992, the United Nations Security Council (UNSC) acted under Chapter VII of the U.N. Charter and passed Resolution 794 authorizing member states to use all necessary means to create a secure environment for the delivery of humanitarian aid.[107] The next day President George H.W. Bush announced Operation Restore Hope, and participating nations formed a U.S. led multi-national coalition known as the United Task Force (UNITAF) to accomplish the mission in Somalia. This force was to stabilize the situation and facilitate a transition to a permanent U.N. peacekeeping force. Statements by UNSC members during and after a meeting on Resolution 794 reiterated the fact that the unique nature of the situation in Somalia, for example the lack of a government and the ongoing attacks on U.N. forces, necessitated the Chapter VII action.[108]

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[105] ALLARD, *supra* note 99, at 15.

[106] See discussion in BLUE HELMETS, *supra* note 98, at 292–294.

[107] S.C. Res. 794, U.N. SCOR, 47th Sess., 3145 mtg., U.N. Doc. S/Res/794 (3 Dec. 1992).

[108] See BLUE HELMETS, *supra* note 98, at 294.

The UNITAF operated in Somalia from 9 December 1992 through 4 May 1993, and ultimately involved more than 38,000 troops from twenty-one coalition nations, including 28,000 Americans.[109] The UNITAF forces quickly stabilized the situation and facilitated the delivery of humanitarian aid throughout the country; however, a totally secure environment still did not exist. Due to the ongoing threats to U.N. and non-governmental organization workers in Somalia, the Secretary-General requested the UNSC approve the use of all necessary means under Chapter VII for the military forces during the follow-on U.N. mission.[110] The UNSC followed the Secretary-General's recommendations regarding a follow-on mission and established UNOSOM II on 26 March 1993 in Resolution 814.[111] The Resolution was significant because it was the first-ever U.N. directed peacekeeping operation under the Chapter VII enforcement provisions of the Charter and included the requirement for UNOSOM II to disarm the Somali clans.[112]

Little changed in Somalia after the transfer to UNOSOM II, and the U.N. continued its operations and negotiated several agreements in an attempt to help the Somalis rebuild their country. It quickly became clear, however, that even though General Aideed signed these agreements, he did not intend to cooperate in their implementation.[113] Increasing tensions culminated in a military engagement between Aideed's forces and U.N. forces on 5 June

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[109] ALLARD, *supra* note 99, at 17.

[110] BLUE HELMETS, *supra* note 98, at 296.

[111] S.C. Res. 814, U.N. SCOR, 48th Sess., 3188 mtg., U.N. Doc. S/Res/814 (26 Mar. 1993).

[112] ALLARD, *supra* note 99, at 18.

[113] BLUE HELMETS, *supra* note 98, at 299.

1993. During a series of attacks, twenty-five Pakistani soldiers died, ten were missing, and fifty-four were wounded.[114] After this attack, the UNSC passed Resolution 837 calling for the immediate apprehension of those responsible.[115] In support of the UNOSOM II mandate, the U.S. deployed U.S. Rangers along with a Quick Reaction Force.[116] These U.S. soldiers quickly became involved in the operations against General Aideed. On 3 October 1993, the Rangers launched an operation to capture a number of Aideed's aides in south Mogadishu. During the resulting action, they succeeded in capturing twenty-four aides, but the U.S. lost two helicopters, eighteen U.S. soldiers died, and seventy-five soldiers were wounded.[117] Following these events, the U.S. briefly reinforced the Quick Reaction Force, but President William Clinton announced the withdrawal of all U.S. forces from Somalia by 31 March 1994.

2. Haiti

In 1987 after almost two centuries of troubled history and instability, Haiti enacted a democratic constitution.[118] Despite this accomplishment, Haiti still experienced a series of

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[114] *Id.*

[115] S.C. Res. 837, U.N. SCOR, 48th Sess., 3229 mtg., U.N. Doc. S/Res/837 (6 Jun. 1993).

[116] These forces were not, however, under the command and control of the U.N.

[117] BLUE HELMETS, *supra* note 98, at 301. The Somalis captured one U.S. helicopter pilot, but the Somalis released him on 14 Oct. 1993. *Id.*

[118] For a brief description of the history of Haiti, see CENTER FOR LAW AND MILITARY OPERATIONS, U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI: LESSONS LEARNED FOR JUDGE ADVOCATES (1995) [hereinafter HAITI LESSONS LEARNED]. This book of lessons learned is the source for much of the foundational information that follows.

military coups over the next three years.[119] Finally, on 16 December 1990, Haiti held a presidential election, in which an exceptionally large majority voted for the Reverend Jean-Bertrand Aristide.[120] President Aristide assumed office on 7 February 1991, and announced a significant restructuring of the Haitian Army.[121] A violent military coup occurred on 30 September 1991, led by Lieutenant General Raoul Cedras and supported by wealthy businessmen accustomed to more control over Haitian politics.[122]

The international community strongly condemned the coup and started massive diplomatic efforts to reinstate President Aristide. The new military government, however, remained in power. Finally, on 16 June 1993, the UNSC placed an oil and arms embargo on Haiti.[123] Shortly thereafter, General Cedras accepted an invitation and came to Governors Island, New York, for a meeting with President Aristide. After long negotiations, these two men were able to reach an agreement that called for President Aristide's return to power no later than 30 October 1993.[124] An advance team from the U.N. arrived in Haiti in September 1993 and found continuing widespread violations of human rights and other instances of

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[119] *See, e.g.,* Howard W. French, *Haiti's Hope is Hostage to Its Army*, N.Y. TIMES, Apr. 9, 1989, sec. 4, at 3; Associated Press, *Haiti Says It Foiled Coup Attempt*, N.Y. TIMES, Oct. 18, 1988, at A14; Howard W. French, *Soldiers Draw the Line In Haiti*, N.Y. TIMES, Sept. 25, 1988, sec. 4, at 2.

[120] Howard W. French, *Haitians Overwhelmingly Elect Populist Priest to the Presidency*, N.Y. TIMES, Dec. 18, 1990, at A1. International observers deemed the election to have been free and peaceful. *Id.*

[121] Howard W. French, *Haiti's New Leader Takes on the Army*, N.Y. TIMES, Feb. 9, 1991, sec. 1, at 3.

[122] Associated Press, *Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1.

[123] S.C. Res. 841, U.N. SCOR, 48th Sess., 3238 mtg., U.N. Doc. S/Res/841 (16 Jun. 1993).

[124] Howard W. French, *Haitian Military and Aristide Sign Pact to End Crisis*, N.Y. TIMES, Oct. 31, 1993, sec. 1, at 1.

violence.[125] The UNSC responded to the Secretary-General's call to demonstrate the commitment of the international community and created the United Nations Mission in Haiti (UNMIH) in Resolution 867 on 23 September 1993.[126] An advance team deployed to Haiti and began work, but when a ship carrying 220 military personnel arrived in Port-au-Prince, armed civilians prevented the ship from landing.[127] This breech of the agreement, along with the ongoing violence in Haiti, prompted the U.N. to re-impose sanctions on Haiti on 13 October 1993.[128] A few days later, on 19 October 1993, the embargo began under the enforcement of United States and Canadian naval vessels and aircraft.[129]

As trade restrictions continued, the political situation in Haiti deteriorated and an ever-increasing flood of Haitians boarded boats and attempted to reach the U.S.[130] On 8 May 1994, President William Clinton announced that the United States would not refuse entry to the fleeing Haitians and allowed them to claim asylum aboard any U.S. vessel.[131] Because of the large influx of migrants, the U.S. established a processing center at the naval base at Guantanemo Bay, Cuba.[132]

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[125] BLUE HELMETS, *supra* note 98, at 618.

[126] S.C. Res.867, U.N. SCOR, 48th Sess., 3282 mtg., U.N. Doc. S/Res/867 (23 Sept. 1993).

[127] BLUE HELMETS, *supra* note 98, at 618.

[128] S.C. Res.873, U.N. SCOR, 48th Sess., 3291 mtg., U.N. Doc. S/Res/873 (13 Oct. 1993).

[129] Garry Pierre-Pierre, *Standoff in Haiti: Once More Shortage in Haiti*, N.Y. TIMES, Oct. 19, 1993, at A18; Howard W. French, *U.S. Tells Haitians of Embargo Terms*, N.Y. TIMES, Oct. 21, 1993, at A7. The UNSC expanded these sanctions on 6 May 1994, based on the continuing lack of cooperation by the military government. S.C. Res. 917, U.N. SCOR, 49th Sess., 3376 mtg., U.N. Doc. S/Res/917 (6 May 1994).

[130] Garry Pierre-Pierre, *Anxious Haitians Start Building Boats Again*, N.Y. TIMES, Oct. 22, 1993, at A1.

[131] Gwen Ifill, *Clinton Grants Exiles Hearings at Sea*, N.Y. TIMES, May 8, 1994, sec.1, at 1.

[132] HAITI LESSONS LEARNED, *supra* note 118, at 11.

On 5 July 1994, in response to the exceptionally large numbers, the United States changed its policy and announced that the U.S. would return Haitian migrants to Haiti or take them to one of the various "safe havens."[133] The deteriorating situation in Haiti prompted the UNSC to pass Resolution 940 on 31 July 1994, authorizing member states to form a multinational task force. The UNSC, acting under Chapter VII, approved the use of all necessary means to: 1) facilitate the departure from Haiti of the military leadership, 2) return the legitimately elected President and restore the legitimate authorities of the Government of Haiti, and 3) establish and maintain a secure and stable environment that would permit the implementation of the Governors Island Agreement.[134] Despite the UNSC action, the military government in Haiti continued its repressive rule. On 17 September 1994, President Clinton sent a team of distinguished statesmen to Haiti in a final attempt to convince the illegitimate government in Haiti to relinquish power.[135] The next day the military government in Haiti agreed to leave power either when the Parliament passed an amnesty law or on 15 October, whichever came first.[136] To enforce this agreement, the United States military began entering Haiti on 19 September 1994 and Operation Uphold Democracy began.

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[133] Michael R. Gordon, *In Shift, U.S. Will No Longer Admit Haitians at Sea*, N.Y. TIMES, July 6, 1994, at A1. These "safe havens" were at various locations to include Guantanemo Bay, Cuba, and Panama. HAITI LESSONS LEARNED, *supra* note 118, at 11.

[134] S.C. Res. 940, U.N. SCOR, 49th Sess., 3413 mtg., U.N. Doc. S/Res/940 (31 Jul. 1994).

[135] Larry Rohter, *Showdown with Haiti: Diplomacy; Carter, in Haiti, Pursues Peaceful Shift*, N.Y. TIMES, Sept. 18, 1994, sec. 1, at 1. The Team consisted of former President Jimmy Carter, General Colin L. Powell, and Senator Sam Nunn. *Id.*

[136] Douglas Jehl, *Showdown in Haiti: The Overview; Haiti's Military Leaders Agree to Resign; Clinton Halts Assault, Recalls 61 Planes: Troops in Today*, N.Y. TIMES, Sept. 19, 1994, at A1.

The force that conducted the semi-permissive entry into Haiti was the Combined Joint Task Force-190 (CJTF-190), commanded by Major General David C. Meade, the Commander of the 10th Mountain Division. Two brigades of the 10th Mountain Division began entering Haiti on 19 September 1994. They arrived using infantry and helicopters that had been loaded onto the aircraft carrier, U.S.S. Eisenhower. On 20 September, soldiers from the 10th Mountain Division deployed into Port-au-Prince while almost 2,000 Marines landed in Cap Haitien from the U.S.S. Wasp. By the time troops from other nations arrived on 4 October, the United States had almost 21,000 soldiers and Marines in Haiti. Soon thereafter, the Haitian Parliament passed amnesty legislation and General Cedras resigned from the Haitian military.[137] President Aristide returned to Haiti on 15 October 1994.[138] Due to the efforts of the multinational task force, the UNSC determined on 30 January 1995, that a secure and stable environment existed in Haiti and that responsibility for operations in Haiti should transfer from the military task force to the UNMIH.[139] This transfer occurred on 31 March 1995.[140]

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[137] BLUE HELMETS, *supra* note 98, at 625.

[138] John Kifner, *Mission to Haiti: The Homecoming; Aristide in a Joyful Return, Urges Reconciliation*, N.Y. TIMES, Oct. 16, 1994, sec. 1, at 1.

[139] S.C. Res. 975, U.N. SCOR, 50th Sess., 3496 mtg., U.N. Doc. S/Res/975 (30 Jan. 1995).

[140] BLUE HELMETS, *supra* note 98, at 627.

3. Bosnia and Herzegovina

The history of conflict in the Balkans is long and complicated, yet it is the key to understanding the area, its culture, and its people.[141] The recent conflicts in the area began with the death of Tito in 1980. The ensuing years saw the loose federation in the region continue to fracture, and instability led to numerous outbreaks of armed conflict and civil war. Despite continuous attempts by the U.N. and individual nations, the situation continued to deteriorate. Even in mid-1995, the war in Bosnia and Herzegovina still appeared to be far from a resolution, because the Bosnian Serbs continued to gain territory and ignored both international warnings and the status of U.N. forces in the area.

The tide began to turn, however, when the newly combined armies of the Muslim-Croat Federation attacked and succeeded in gaining territory in the northwest. After the fall of several U.N. declared safe areas (Srebrenica and Zepa) to Bosnian Serb forces, the international community had to act, and NATO began a month long bombing campaign, Operation Deliberate Force.[142] In September 1995, an offensive by the Muslim-Croat forces reduced Serb controlled territory to only fifty percent of Bosnia and Herzegovina. This parity provided an impetus to increase diplomatic efforts, which in turn led to a cease-fire on 5 October 1995, and a meeting between the parties in Dayton, Ohio.

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[141] This overview of the Balkan conflict will be necessarily brief. For a summary of the relevant history see BALKANS LESSONS LEARNED, *supra* note 82, at 28–42. The information in this summary stems primarily from that source and focuses on the United Nations (U.N.) and North Atlantic Treaty Organization (NATO) operations in the area since that time. For a broader discussion of the region and its history, see REBECCA WEST, BLACK LAMB AND GREY FALCON (1995); NOEL MALCOLM, BOSNIA: A SHORT HISTORY (1994); RICHARD HOLBROOKE, TO END A WAR (1998).

[142] BALKAN LESSONS LEARNED, *supra* note 82, at 37–39.

After seemingly endless negotiations, the parties finally initialed the Dayton Peace Accord on 21 November 1995.[143] Shortly thereafter, on 5 December, NATO approved a plan for forces on a peace enforcement operation to enter Bosnia and Herzegovina pursuant to the Dayton Peace Accord. The parties signed the official peace agreement, the General Framework Agreement for Peace (GFAP), on 14 December 1995.[144] The next day, the UNSC passed Resolution 1031 granting the authority, under Chapter VII of the U.N. Charter to use military force to implement the GFAP.[145] On 16 December 1995, NATO forces, called the Implementation Force (IFOR), began entering Bosnia and Herzegovina for Operation Joint Endeavor.

Annex 1A of the GFAP provided details for IFOR's mission.[146] In the most basic terms, IFOR was to impartially assist the former warring factions with implementing the terms of the peace agreement and to support, within the limits of its mandate and resources, other organizations responsible for the civilian aspects of the agreement. The mission also included providing a safe and secure environment in Bosnia and Herzegovina in order to

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[143] Elaine Sciolino, *Balkan Accord: The Overview; Accord Reached to End the War in Bosnia; Clinton Pledges U.S. Troops to Keep Peace*, N.Y. TIMES, Nov. 22, 1995, at A1.

[144] General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, Bosn & Herz. – Croat. – Fed. Rep. Yug., 35 I.L.M. 75 (entered into force Dec. 14, 1995) [hereinafter GFAP]. The various annexes established primary responsibilities for the various aspects of the mission. IFOR had primary responsibility for the implementation of the military aspects. *Id.* Annex 1A. The Organization for Security and Cooperation in Europe had primary responsibility for assisting in the upcoming elections. *Id.* Annex 3. The United Nations High Commissioner for Refugees had primary responsibility for assistance with the returns of refugees and other displaced persons. *Id.* Annex 7. The Office of the High Representative had the overall responsibility for the coordination of all agencies involved in the implementation of the civilian aspects of the GFAP. *Id.* Annex 10.

[145] S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607 mtg., U.N. Doc. S/Res/1031 (15 Dec. 1995).

[146] GFAP, *supra* note 144, Annex 1-A (Agreement on Military Aspects of the Peace Settlement).

facilitate the humanitarian assistance missions of the many non-governmental organizations and international organizations operating in the country.

The initial U.N. authorization for IFOR spanned only one year. As the end of that year approached, the situation was not sufficiently stable to end the NATO mission.[147] On 12 December 1996, the UNSC passed Resolution 1088 granting authority for a Stabilization Force (SFOR) to continue the mission for the next eighteen months. SFOR retained the same authority to implement the GFAP as IFOR.[148] This mission was Operation Joint Guard. While SFOR continued its peacekeeping mission, Bosnia and Herzegovina did not make enough progress to allow the international forces to conclude the mission at the end of the eighteen months. On 15 June 1998, the UNSC passed Resolution 1174 approving a continuation of the mission in Bosnia and Herzegovina.[149] On 20 June 1998 the SFOR forces transitioned to a smaller force and began Operation Joint Forge. The UNSC has continued to extend the missions of both SFOR and the U.N.'s Mission in Bosnia and Herzegovina.[150]

4. Kosovo

Only a few hundred miles from Bosnia and Herzegovina is a small province in southern Serbia that provides another example of the great instability of the Balkan region that has

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[147] BALKAN LESSONS LEARNED, *supra* note 82, at 47.

[148] S.C. Res. 1088, U.N. SCOR, 51st Sess., 3723 mtg., U.N. Doc. S/Res/1088 (12 Dec. 1996).

[149] S.C. Res. 1174, U.N. SCOR, 53d Sess., 3892 mtg., U.N. Doc. S/Res/1174 (15 Jun. 1998).

[150] S.C. Res. 1247, U.N. SCOR, 54th Sess., 4014 mtg., U.N. Doc. S/Res/1247 (18 Jun. 1999); S.C. Res. 1305, U.N. SCOR, 55th Sess., 4162 mtg., U.N. Doc. S/Res/1305 (21 Jun. 2000).

lead to intervention by the international community.[151] Kosovo has been a potential hot spot, especially throughout the 1990's, due to the ongoing instability of the entire Balkan region. In the late 1980's, Slobodan Milosevic, the President of the Former Republic of Yugoslavia, withdrew the autonomy that Kosovo had enjoyed for many years and implemented numerous repressive policies. He removed the Kosovar Albanians from all positions of authority despite the fact that they made up ninety percent of the population.[152]

In 1998, Milosevic's campaign against the Kosovar Albanians turned from discrimination to systematic violence.[153] During the early months of 1998, military forces from the Federal Republic of Yugoslavia (FRY) began a series of operations against the Kosovo Liberation Army (KLA). During these operations, the FRY forces committed numerous atrocities against the Kosovar Albanian civilians in the area. On 31 March 1998, the UNSC adopted Resolution 1160 condemning the excessive use of force against civilians and establishing an arms and material embargo against the FRY.[154] There was little improvement despite ongoing diplomatic efforts, and on 12 June the Contact Group[155] met in London. Thereafter, they issued a statement calling for: "(1) a cease-fire; (2) effective international monitoring in Kosovo; (3) access for the United Nations High Commissioner for Refugees (UNHCR) and

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[151] For a more detailed discussion of the history and the conflict in Kosovo, see, NOEL MALCOLM, KOSOVO: A SHORT HISTORY (1998); VICTORIA CLARK, WHY ANGELS FALL: A JOURNEY THROUGH ORTHODOX EUROPE FROM BYZANTIUM TO KOSOVO (2000).

[152] DEPARTMENT OF DEFENSE, REPORT TO CONGRESS: KOSOVO/OPERATION ALLIED FORCE AFTER ACTION REPORT 1 (Jan 31, 2000) [hereinafter DoD KOSOVO REPORT]. Most of the operational facts of Operation Allied Force in this section derive from this Report.

[153] *Id.* at 2.

[154] S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868 mtg., U.N. Doc. S/Res/1160 (31 Mar. 1998).

[155] This group consists of the Defense Ministers for members of the North Atlantic Council.

non-governmental organizations (NGOs) along with refugee return; and (4) serious dialogue between Belgrade and the Kosovo Albanians with international mediation."[156]

Soon thereafter Milosevic agreed to limited international monitoring; however, the mistreatment of civilians continued. The UNSC passed resolution 1199 on 23 September 1998 calling for, among other things: 1) a cease fire, 2) the withdrawal of all FRY security forces, 3) access for NGOs and humanitarian organizations, and 4) the return home of refugees and the internally displaced.[157] On 5 October, U.N. Secretary General Koffi Annan released a highly critical report on the lack of FRY compliance with the provisions of UNSCR 1199.[158] Based upon that lack of cooperation, NATO continued with plans for military intervention should it become necessary. Through continuous diplomatic efforts, the parties started making limited progress towards a peaceful resolution of the conflict.

In early January 1999, however, the KLA killed three Serb police officers during an ambush near Stimlje. This prompted FRY forces to begin a significant build-up of Serb security forces in that area. International diplomats convinced representatives from both sides to attend a summit in Rambouillet, France that began on 6 February 1999.[159] While the meeting did not produce an agreement, the Kosovar Albanians signed a proposed agreement in subsequent talks held at the Kleber Center in Paris from 15 – 19March 1999. These talks were suspended, however, before the FRY representatives signed the agreement. In the

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[156] DoD KOSOVO REPORT, *supra* note 152, at A-2.

[157] S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930 mtg., U.N. Doc. S/Res/1199 (23 Sep. 1998).

[158] DoD KOSOVO REPORT, *supra* note 152, at A-3.

[159] *Id.* at A-5 to A-6.

meantime, the FRY military had been massing in and around Kosovo in preparation for an offensive.[160] On 19 March, the international observers withdrew from Kosovo due to the volatility of the situation. The next day, the Serb forces launched a massive offensive, which drove thousands of ethnic Albanians from their homes and killed many others without any justifiable reason.[161] After the failure of one final attempt at a diplomatic solution, NATO authorized air military operations against the FRY under the authority of the UNSC. Operation Allied Force began on 24 March 1999.

The air campaign lasted seventy-seven days and ended on 10 June 1999, when NATO Secretary-General Javier Solana temporarily suspended NATO's air operations based on the initiation of a full withdrawal of Yugoslav forces from Kosovo. This withdrawal was pursuant to the Military-Technical Agreement between NATO and the Federal Republic of Yugoslavia.[162] On 10 June, the UNSC passed Resolution 1244 welcoming the FRY's acceptance of the principles for a political solution to the Kosovo crisis.[163] It also announced the UNSC's decision to deploy international civil and security presences in Kosovo, under the auspices of the United Nations (KFOR).[164] The first elements of KFOR entered Kosovo on 12 June 1999. By 20 June, the Serb withdrawal was complete and KFOR established operations throughout Kosovo.

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[160] *Id.* at A-7.

[161] *Id.*

[162] *See* Military Technical Agreement, Jun. 9, 1999, KFOR-Serb.-F.R.Yugo., *reprinted in* 38 I.L.M. 1217 (1999) [hereinafter Kosovo MTA].

[163] S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011 mtg., U.N. Doc. S/Res/1244 (10 Jun. 1999).

[164] *Id.*

V. Legal Structure for Peace Operations

Ambiguity often confronts anyone trying to apply international, foreign, and U.S. law to peace operations. Two examples from recent peace operations demonstrate the confusion created by this legal ambiguity. During the mission in Haiti, one U.S. officer disobeyed orders when he based an "inspection" of the Haitian prison in Port au Prince on his misunderstanding of international law and the obligations placed on him and U.S. forces.[165] In addition, on 31 March 1999, during a peace operation near Kosovo, Serbian military forces captured three U.S. servicemen along the border of the Former Yugoslav Republic of Macedonia.[166] The exact status of these soldiers under international law was in question and even statements by the U.S. Government seemed contradictory.[167] The varying nature and locations of peace operations combine to provide a fluid "legal battlefield" where the only constant is change.

Several areas of law apply to U.S. forces during a peace operation and can guide attorneys through the issues if they understand these regimes and their hierarchy. These areas provide a few clear answers to judge advocates, but for the most part, attorneys in a

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[165] *See* HAITI LESSONS LEARNED, *supra* note 118, at 112 – 115; Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275 (1995). For article based on the collection of *amicus curae* briefs in support of Captain Rockwood, see Robert O. Weiner & Fionnuala Ni Aolain, *Beyond the Laws of War: Peacekeeping in Search of a Legal Framework*, 27 COLUM. HUM. RTS. L. REV. 293 (1996).

[166] John H. Cushman, Jr., *Crisis in the Balkans: The Ambush; 3 G.I.'s missing in Macedonia After they Reported Attack*, N.Y. TIMES, Apr. 1, 1999, at A1.

[167] See Major Geoffrey S. Corn & Major Michael L. Smidt, *"To Be or Not To Be, That is the Question" Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1.

peace operation should not expect to find a "neat" answer to legal questions.[168] The following legal regimes differ from the general principles of peace operations discussed in Section IV(A), in that these entail binding laws that may apply. The applicable legal regimes include international and foreign bodies of law such as the Law of War, Human Rights Law, and Host Nation Law; in addition to U.S. law and policy.

A. International and Foreign Law

1. Application of The Law of War (Jus in Bello) as a matter of law

The first question to ask in a peace operation is whether The Law of War applies as a matter of law.[169] Article 2 of the Geneva Conventions details the "trigger" for the formal application of the Law of War. It states:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[170]

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[168] *See* discussion in U.S. Army Europe, Office of the Judge Advocate, Kosovo After Action Review 357-58 (June 13, 2000) (unpublished manuscript, on file with Center for Law and Military Operations) [hereinafter USAREUR Kosovo AAR].

[169] *See* International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17. See the discussion *supra* Sections II and III for a brief discussion of the content of the Law of War.

[170] GC I, *supra* note 16, art. 2; GC II, *supra* note 16, art. 2; GC III, *supra* note 16, art. 2; GC IV, *supra* note 16, art. 2. Protocol I to the 1949 Geneva Conventions states that its provisions will apply to those conflicts defined by Common Article 2 of the 1949 Geneva Conventions. Protocol I, *supra* note 18, art. 1(3).

Scholars disagree about whether the Law of War applies to peace operations. Opinions even diverged within one Working Group at an ICRC Symposium. One expert felt that this body of law applies as soon as consent is withdrawn.[171] Another expert required actual confrontation.[172] Still another expert would apply the Law of War to all peace operations, because its application does not depend on the status of troops as combatants.[173] Resolution of this specific question is beyond the scope of this thesis and the following discussion and analysis will concern only those peace operations when the Law of War does not apply as a matter of law. This body of law, however, maintains its relevance because its rules and principles are key considerations with respect to any use of force by the military during a peace operation, whether in self-defense or for mission accomplishment.

2. *Enforcement of Basic Human Rights*

The next applicable body of international law is Human Rights Law. Enforcement of fundamental human rights is the most elementary of the international legal obligations during a peace operation. In many respects, it represents the true purpose underlying the entire operation. Any dispute regarding human rights does not concern whether they apply, but which human rights apply to the given situation.

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[171] ICRC SYMPOSIUM, *supra* note 86, at 75 (Report of Working Group 1).

[172] *Id.*

[173] *Id.* A representative from the ICRC stated the view that: "International humanitarian law may be applicable to UN forces as they are armed and have the right to use their arms: the reason for the use of force is of no concern to international humanitarian law." *Id.* at 57 (statement by Mr. Toni Pfanner, Head of the Legal Division, ICRC). For the purposes of this thesis, the assumption will be that the Law of War does not apply as a matter of law.

To determine which human rights apply during peace operations, the judge advocate must understand what conduct is covered by human rights law and make the distinction between human rights obligations that are treaty/convention based and those that are part of customary international law. When discussing the concept of international human rights, judge advocates must also understand that the U.S. asserts that this body of law only governs relations between a state and its own inhabitants, not relations between individuals.[174] While violence between individuals will potentially be an issue for U.S. military forces on a peace operation, this body of law addresses only state action.

Human rights law exists in two basic forms: treaty law and customary international law. Treaty-based human rights bind only the signatories to that particular treaty and not any third-party state without its own consent.[175] The U.S. asserts that rights created by a treaty signed and ratified by the U.S. adhere only to persons in the U.S. unless the treaty or implementing legislation says otherwise. This position uses the "non-extraterritoriality" form of treaty interpretation.[176] Generally, rights created solely by a treaty obligation of the U.S. will not apply overseas.

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[174] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987) (reporter's notes (2)) [hereinafter RESTATEMENT]. *But see, e.g.,* Winston P. Nagan, *Human Rights and Non-state Actors*, 11 PACE INT'L L. REV. 209 (1999); Ruti Teitel, *Human Rights Theory: Human Rights Genealogy in Symposium: Human Rights on the Eve of the Next Century: Beyond Vienna & Beijing*, 66 FORDHAM L. REV. 301, 311–12 (1997).

[175] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 34, 1155 U.N.T.S. 331.

[176] *See* Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78–82 (1995). For a more developed discussion of this and the concept of treaty execution, which addresses the impact of the implementing legislation, see INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 41–45 (2001) [hereinafter OPS LAW HANDBOOK]; Major Richard Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 23–26.

If, however, a human right has attained customary international law status, then it does apply to U.S. forces during a peace operation. United States law includes the customary international law of human rights.[177] Since human rights law regulates state actors (e.g. the U.S. military forces) with respect to interaction with any human being, these fundamental human rights apply to any civilians that U.S. forces encounter during peace operations.[178] In order to ensure that they do not violate this body of law, U.S. forces in a peace operation must understand which human rights have attained customary international law status and which human rights apply due to the specific wording of a treaty or executing legislation.[179] At this time, no list definitively details which human rights have attained "fundamental" status under customary international law. Instead, one must examine several national and international documents to identify these "fundamental human rights."

The Restatement of Foreign Relations Law of the United States provides a list of rights that attained "fundamental" status under customary international law as of 1987. According to the Restatement, a state violates international law if, as a matter of state policy, it practices, encourages, or condones: genocide,[180] slavery or slave trade, the murder or

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[177] Restatement, *supra* note 174, §702 cmt. c.

[178] For a more detailed discussion, see OPS LAW HANDBOOK, *supra* note 176, at 39–45.

[179] *Id.* at 39.

[180] Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. *See*, The Statute of the International Criminal Tribunal for the Former Yugoslavia, *reprinted in* 32 I.L.M. 1192 (1993); s*ee also* Rome Statute of the International Criminal Court, UN DOC. A/CONF. 183/2/Add.1 (1998) *reprinted in* 37 I.L.M. 1002, 1008 (1998); Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 11, 1948, art. II, 78 U.N.T.S. 277.

causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights.[181] The Comment to this section specifically recognizes, however, that the "list is not necessarily complete, and is not closed."[182]

While not meant as a list of "fundamental" human rights, Common Article 3 to the Geneva Conventions[183] is the oldest of several international documents that aids in the search for fundamental rights. Common Article 3 specifically enumerates minimum standards for conduct during an internal armed conflict, but the rights listed are widely accepted as a statement of customary international law regarding fundamental human rights applicable at all times.[184] Common Article 3 prohibits violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, which affords all the judicial guarantees recognized as indispensable by civilized peoples.[185]

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[181] Restatement, *supra* note 174, §702.

[182] *Id.* §702 cmt (a).

[183] GC I, *supra* note 16, art. 3; GC II, *supra* note 16, art. 3; GC III, *supra* note 16, art. 3; GC IV, *supra* note 16, art. 3 [collectively hereinafter Common Article 3].

[184] Theodor Meron, *The Geneva Conventions as Customary International Law*, 81 AM. J. INT'L L. 348 (1987).

[185] Common Article 3, *supra* note 183.

The United Nations Charter also provides insight into the determination of fundamental human rights. Article 1 of the Charter lists the Purposes of the United Nations. The list includes the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.[186] Another of the enumerated principles is "encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."[187]

The most extensive international document offering a list of human rights is the Universal Declaration of Human Rights. Extensive work at the United Nations in the years immediately following World War II resulted in this Declaration. Its all-encompassing list includes the following: all persons are equal, no discrimination based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status; life, liberty, and security of person; no slavery; no cruel, inhumane or degrading treatment or punishment; all are equal before the law; no arbitrary arrest or detention; a fair and public hearing by impartial tribunal for any criminal charges; presumption of innocence; freedom of thought, conscience and religion; freedom of expression; and self-determination.[188] Only portions of the enumerated rights in the Universal Declaration have attained customary international law status, to include the prohibitions on torture, violence to

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[186] U.N. CHARTER art. 1, ¶ 2.

[187] Id. ¶ 3.

[188] G.A. Res. 217 A(III), U.N. Doc. A/217A(III) (1948) [hereinafter Universal Declaration of Human Rights]. This is only a partial list of the rights enumerated in the Declaration.

life or limb, a fair and just trial (fair and public hearing by an impartial tribunal), arbitrary arrest and detention, and the right to equal treatment before the law.[189]

By consolidating the above four documents, one can develop a list of current fundamental human rights under customary international law. A state violates international law if, as a matter of state policy, it practices, encourages, or condones the following:

> (1) Genocide;
> (2) Slavery or slave trade;
> (3) The murder or causing the disappearance of individuals;
> (4) All violence to life or limb;
> (5) Torture or other cruel, inhuman, or degrading treatment or punishment;
> (6) Prolonged arbitrary detention;
> (7) Taking of hostages;
> (8) Systematic racial, religious, or gender discrimination;
> (9) A consistent pattern of gross violations of internationally recognized human rights;
> (10) Activity that inhibits a citizen's freedom of self-determination; or
> (11) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

At a minimum, these fundamental human rights are those that U.S. military forces on a peace operation must protect, respect, and most especially, consider when analyzing the impact of their operations on the local population.

[189] OPS LAW HANDBOOK, *supra* note 176, at 40 (citing GERHARD VON GLAHN, LAW AMONG NATIONS 238 (1992).

3. Host Nation Law

In addition to the Law of War and Human Rights Law, another area of international and foreign law applicable during peace operations is the law of the host nation. The default position under international law is that a sovereign state's domestic laws apply within its territory.[190] Generally only armed conflict or an agreement or waiver by the sovereign will displace these domestic laws. Since no international armed conflict exists during a peace operation, domestic laws apply unless waived by the host nation government. This waiver, if any, will frequently be contained in a status of forces agreement or in other foundational legal documents.[191] The form and extent of any such waiver varies largely with the type of peace operation (peacekeeping or peace enforcement) and the amount of time available to conclude such an agreement before the deployment of U.S. forces.[192]

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[190] Restatement, *supra* note 174, §206.

[191] These agreements cover a wide range of topics to include criminal jurisdiction over the forces, the authority to fly a U.S. flag in a foreign nation, a waiver of normal customs requirements and duties, and the authority to carry arms. *See, e.g.*, Major Manuel E. F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, ARMY LAW., May 1994, at 3 (providing a history of status of forces agreements and their content). See also OPS LAW HANDBOOK, *supra* note 176, at ch. 16.

[192] Of the four operations discussed above, only two had agreements in place upon the entry of U.S. forces into the country. There was no viable government in Somalia, and thus, no authority to negotiate with regarding a status of forces agreement. U.S. Army Legal Operations, Operation Restore Hope After Action Review, 5 December 1992 – 5 May 1993 at 3 (n.d.) (unpublished manuscript, on file with Center for Law and Military Operations) [hereinafter Restore Hope AAR]. The extremely short time frame between the shift to a permissive entry into Haiti also precluded the negotiation of a status of forces agreement until after U.S. forces were in Haiti and had established a safe and secure environment. HAITI LESSONS LEARNED, *supra* note 118, at 50–53. In contrast, time and the political situations allowed agreements before U.S. forces entered both Bosnia and Herzegovina and Kosovo. *See* GFAP, *supra* note 144, app. B to annex 1A; Kosovo MTA, *supra* note 162.

Under the historic doctrine of extraterritoriality, when a state requested another to place troops in its territory, that state automatically ceded a portion of its territorial jurisdiction to the state that placed its troops on the former state's territory. Today, however, this doctrine is in doubt. See discussion in HAITI LESSONS LEARNED, *supra* note 118, at 51.

Even if a status of forces agreement or other international document delineates which local national laws do or do not apply, judge advocates can still expect to confront numerous problems. For example, after the status of forces agreement covering the Multi-National Force went into effect in Haiti, a question arose regarding whether certain U.S. service members on military flights leaving Haiti needed to pay a departure fee to the Haitian authorities.[193] Similarly, the wording of the Status of Forces Agreement in Bosnia and Herzegovina raised questions over the exact status of civilian contract employees serving with U.S. forces.[194]

Even when the international community recognizes that certain local national laws apply during an operation, the actual application of those laws can be somewhat problematic. For example, troops entering Kosovo understood that local law still applied, but the exact substance of those local laws was unclear. Initially, the U.N. instructed KFOR to apply local laws, as they existed before 1989, excepting any conflicts with international standards for human rights. [195] A short time later, however, the U.N.'s guidance changed and required the international community to apply the laws of Kosovo, as they existed after 1989.[196] The international community struggled for months with this confusion and as of late 1999, the U.N.'s guidance was that the laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as those laws do not conflict with

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[193] HAITI LESSONS LEARNED, *supra* note 118, at 52–53.

[194] *See e.g.*, Memorandum from Lieutenant Colonel Karl Goetzke, Deputy Staff Judge Advocate, to Major John Thiel, Assistant Contract Officer, subject: Brown and Root Service Corporation, ¶3(c) (n.d.) (copy on file with Center for Law and Military Operations).

[195] USAREUR Kosovo AAR, *supra* note 168, at 453–454.

[196] *Id.*

internationally recognized human rights standards.[197] A different but related problem initially confronted U.S. forces in Bosnia and Herzegovina. Upon arrival, judge advocates attempted to obtain certain local laws necessary for their mission but had difficulty locating copies of the applicable laws for the Federation and the Republika Srbska.[198]

B. U.S. Law and Policy

In addition to the various bodies of international and foreign law discussed above, many U.S. laws still apply to everything U.S. military forces do during a peace operation. This is a fact many members of U.S. forces understand. For example, soldiers know that the Uniform Code of Military Justice governs their conduct at all times and locations. In addition, commanders understand that certain requirements of U.S. fiscal law dictate what they may and may not do with their resources and soldiers. Unfortunately, not all U.S. laws and policies applicable to U.S. forces in a peace operation are this clear.

Department of Defense Directive 5100.77 provides one example of this ambiguity.[199] This directive states that the military must "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the

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[197] Memorandum, Major Michael Henry, Legal Advisor to Task Force Falcon, to Commander, Task Force Falcon, subject: Information on the Applicable Law in Kosovo (27 Oct. 1999) (copy on file with Center for Law and Military Operations); *see also* USAREUR Kosovo AAR, *supra* note 168, at 65.

[198] Office of the Staff Judge Advocate, 1st Infantry Division, After Action Review Oct. 96 – Nov. 97, at 35 (n.d.) (unpublished manuscript, copy on file with Center for Law and Military Operations) [hereinafter 1st ID AAR]. After some time, however, SFOR was able to obtain copies of applicable laws and hire a local attorney for assistance. *Id.*

[199] Buhlman, *supra* note 7, at 178.

law of war during all other operations."[200] The implementing Chairman of the Joint Chiefs of Staff Instruction reiterates this ambiguous policy. It states: "the Armed Forces of the United States will comply with the law of war during all armed conflicts; however, such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations."[201] Neither these documents nor any other official publication provides a more detailed description of what this requirement means.

The U.S. is not alone in its application of the "principles and spirit" of the Law of War to peace operations. The U.N. has followed a similar requirement with regard to forces under its command and control for many years.[202] In addition, the U.N. recently made this requirement even more explicit. The Secretary General issued a Bulletin in 1999 that states:

> The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.[203]

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[200] DoD DIR 5100.77, *supra* note 3, at 5.3.1.

[201] CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01A, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM ¶ 5 (Aug. 27, 1999).

[202] See ICRC SYMPOSIUM, *supra* note 86, at 57. "When the United Nations refers to theses principles, it may primarily be referring to customary law and, in the words of the International Court of Justice, to 'general principles of humanitarian law to which the [Geneva] Conventions merely give specific expression." *Id.* (*referring* to Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 220 (June 27)).

[203] *U.N. Secretary-General Bulletin* 13, at ¶ 1.1, U.N. Doc. ST/SGB/1999/13 (1999).

The principles enumerated in the Secretary-General's Bulletin generally agree with the principles of the Law of War that the U.S. applies to peace operations.[204]

The application of the "principles and spirit" of the Law of War is only one facet of a thorough analysis of an issue presented during a peace operation. Many other components of U.S. law may affect military operations. These include fiscal laws, Department of Defense Directives, Department of the Army Regulations, and many other laws and regulations. Judge Advocates must ensure that they consult all applicable sources meet the legal requirements for any proposed project or mission during the peace operation.

VI. Common Issues in Peace Operations

The last two sections presented the background on recent peace operations that involved U.S. forces and discussed the general legal framework that governed these forces during those deployments. This section will combine those discussions by analyzing common issues confronted by judge advocates during those operations and examining how they applied the law to those issues.

The four peace operations in Somalia, Haiti, Bosnia and Herzegovina, and Kosovo demonstrate the variety of possible operations in which U.S. forces may participate. The mission in Somalia began as a purely humanitarian effort with the alleviation of human suffering as the center of the mission. Only after continuing problems with the local

[204] Memorandum from W. Hays Parks, Special Assistant to the Judge Advocate General on the Law of War, to The Assistant Judge Advocate General for Law and Military Operations, subject: Secretary General's Bulletin: Observance by United Nations Forces of International Humanitarian Law (12 Aug. 1999) (on file with author).

population and uncooperative "warlords" did the mission evolve into a more military oriented operation with the mission to establish a safe and secure environment culminating with actual combat operations. The mission in Haiti was within hours of beginning as a forced entry operation focused on establishing a secure environment to facilitate the return of the legitimate government. Only the last minute "agreement" prevented this and allowed for the permissive entry and follow-on operations to help re-establish the Aristide government. In Haiti, the military focus was on establishing the secure environment despite the deplorable conditions. Forces in the Balkans deployed into an area suffering from years of armed conflict. For IFOR/SFOR in Bosnia and Herzegovina, the mission, especially at the beginning of the operation, was to enforce the military aspects of the GFAP and provide a safe and secure environment. Other civilian agencies had the primary responsibility for the humanitarian needs of the populace. In neighboring Kosovo ground forces entered the area on the heels of an armed intervention by NATO via air power. The military's mission in Kosovo, however, included both establishing a secure environment and providing direct support to humanitarian tasks.[205] This expanded mission presented U.S. forces with a myriad of legal issues, many of which seem to be repetitive. Three examples of the pervasive issues faced in these operations are the provision of humanitarian and civic assistance to the populace, civilian detainees, and searches.

[205] *See* Message, 131310Z Aug 99, United States Commander in Chief, U.S. Forces Europe, subject: USKFOR Program Approval and Funding for Urgent Humanitarian Needs (13 Aug. 1999) [hereinafter KFOR Humanitarian Funding Message].

A. Humanitarian and Civic Assistance

Due to the very nature of peace operations, human suffering often surrounds peace operation forces. The destruction and discomfort associated with armed conflict, which usually precedes such a deployment, lingers to confront soldiers as they move about the area of operations. While every soldier will likely want to assist the local populace, there are restrictions that determine the level of support that U.S. forces can offer to alleviate this suffering.

Little to no international law provides specifics on what support a military force should provide during a humanitarian operation.[206] The foundational legal documents may offer some guidance,[207] but for U.S. forces in a peace operation, U.S. law strictly governs the amount and type of humanitarian and civic assistance permitted.[208] This often contrasts with the requirements of military forces from other nations participating in the peace operation.[209]

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[206] Some argue, however, that there is an obligation under international law requiring an individual to act to enforce certain human rights. *See* Weiner & Aolain, *supra* note 165.

[207] *See, e.g.,* GFAP, *supra* note 144, at annex 1A, art. IV, ¶ 3.

[208] For example, see 10 U.S.C. §401 (2000) and U.S. DEP'T OF DEFENSE, DIR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS (6 Oct. 1994). For a more detailed discussion, see Denise Vowell, *Using Operation and Maintenance Funds in Contingency Operations*, MIL. REV. 38 (Mar – Apr. 2000); Glenn Bowens, *Legal Issues in Peace Operations*, PARAMETERS 51 (Winter 1998 – 99).

[209] While serving with the Stabilization Force during 1999, the author frequently confronted Allies that did not understand that the U.S. laws prevented our forces from performing certain tasks, despite the fact that the U.S. forces could do so easily. The differences in applicable laws, however, was often used to identify Allied forces that could perform a certain mission that U.S. forces were precluded from doing, e.g. removal of debris to facilitate returns at a certain site. *See also* Office of the Staff Judge Advocate, 10th Mountain Division (Light Infantry), After Action Review on Task Force Eagle, subject: Humanitarian and Civic Assistance in Task Force Eagle (n.d.) (on file with Center for Law and Military Operations).

U.S. forces in Haiti received numerous requests for assistance to help the Haitian population, e.g. to improve certain roads.[210] Frequently, these requests originated from another U.S. agency providing support to the Haitians. The judge advocates often elevated these requests to higher authorities so that the requesting agency would transfer the proper funds to the Army pursuant to the Economy Act,[211] which allowed the U.S. military to perform the requested projects. Later during the operation, an agreement between the U.S. and Haiti allowed the U.S. military to provide a broad range of commodities and services on a reimbursable basis.[212]

Requests for humanitarian and civic assistance confronted U.S. forces quickly upon arrival in Bosnia and Herzegovina.[213] These requests for humanitarian and civic assistance confronted SFOR continuously and frequently concerned building of roads into a town, removal of debris, and the use of U.S. military equipment to transport items for non-governmental organizations.[214] These issues continue to confront U.S. forces and judge advocates must analyze each proposal under the applicable laws.[215]

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[210] HAITI LESSONS LEARNED, *supra* note 118, at 141.

[211] *Id.* (citing 31 U.S.C. 1535 (1988 & Supp.) (providing authority for federal agencies to order goods and services from other federal agencies, and to pay the actual costs of those goods and services).

[212] HAITI LESSONS LEARNED, *supra* note 118, at 142 (citing Agreement Between the United States of America and the United Nations Organization Concerning the Provision of Assistance on a Reimbursable Basis in Support of the Operations of the United Nations in Haiti, 19 Sept. 1994, U.S.-U.N. (copy on file with Center for Law and Military Operations)).

[213] Early requests included construction or repair of "everything from sewage pumps to garbage dumps." Balkan Lessons Learned, *supra* note 82, at 146.

[214] *Id.* at 146–47.

[215] Office of the Staff Judge Advocate, 10th Mountain Division After Action Review for Task Force Eagle, subject: Humanitarian and Civic Assistance in Task Force Eagle (n.d.) ("A key factor in the analysis was that TFE did not have any funds available specifically for humanitarian related activities, thus any mission had to be paid for by normal operations and maintenance funds. . . . TFE was limited to *de minimis* HCA, as defined in

U.S. forces operating in Kosovo, only a short distance from those in Bosnia and Herzegovina, were able to provide much more direct assistance to the local population. These U.S. forces, Task Force Falcon, had millions of dollars available for use in the U.S. controlled sector for various projects to alleviate urgent humanitarian needs.[216] U.S. forces had authorization to use these funds for essential repair of schools, repair of electrical grids, medical support and supplies, urgent humanitarian housing needs, repair of water treatment plants, replacement/repair of fire and sanitation trucks, and provision of diesel fuel to farmers.[217] Task Force Falcon later received authority to use this money to provide fuel to civilian emergency vehicles and trash disposal vehicles in their area of operations as well.[218]

Examination of documents generated by judge advocates who reviewed requests for humanitarian and civic assistance in these peace operations shows little to no consideration of the principles and spirit of the Law of War.[219] Clearly, any analysis using the principles of distinction and proportionality is unhelpful, because the "target" of the proposed operation is the civilian populace. Consideration of the principle of military necessity closely relates to

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Department of Defense Directive 2205.2.") (copy on file with Center for Law and Military Operations). *See also* BALKAN LESSONS LEARNED, *supra* note 82, at 145–47.

[216] KFOR Humanitarian Funding Message, *supra* note 205.

[217]. *Id.* These projects were subject to other considerations detailed in the message, such as prior coordination of any projects with U.S. Agency for International Development and the Department of State. *Id.*

[218] Message, 101424Z Sep 99, U.S. Commander in Chief, Europe, subject: USKFOR Program Approval for Urgent Humanitarian Needs, (10 Sept. 1999) (copy on file with Center for Law and Military Operations).

[219] This includes those documents listed in notes 213–18. *See also* Memorandum, F.M. Lorenz, Staff Judge Advocate, Unified Task Force Somalia, to J-3 and CMOC, Joint Task Force Somalia, subject: Humanitarian and Civic Assistance (21 Jan. 1993) (copy on file with CLAMO) [hereinafter Lorenz Memorandum]; *see generally*, Office of the Staff Judge Advocate, 10th Mountain Division (Light Infantry), Operation Uphold Democracy After Action Review 7 (n.d.) (discussing the limited scope of Department of Defense funding for humanitarian assistance) (unpublished manuscript, on file with the Center for Law and Military Operations).

the analysis judge advocates must use before rendering an opinion that use of operations and maintenance funds is proper. The final principle, humanity, also provides little assistance. While consideration of preventing "unnecessary suffering" may appear to be on point, the focus of this principle in the Law of War is on the regulation of the use of military force and its resulting suffering. This differs from the relief of extant suffering, which is at issue in providing humanitarian and civic assistance. The issues and principles at issue, however, are almost completely that of U.S. fiscal law and not the Law of War. This reaffirms the fact that many aspects of U.S. law (or international law) may provide relatively clear guidance for the judge advocate when providing legal advice to the commander on certain issues. Any application of the "principles and spirit" of the Law of War must come in conjunction with an analysis of applicable U.S. and international or foreign law. The U.S. policy to apply the principles and spirit of the Law of War is not a "one stop shop."

B. Detainees

The detention of civilians is another significant issue consistently confronted during peace operations. In Somalia, Haiti, Bosnia and Herzegovina, and Kosovo, U.S. forces dealt with questions regarding the authority to detain civilians and the procedures to use during those detentions. These issues confronted the forces during pre-deployment planning and again almost immediately upon arrival. All four headquarters adopted polices that provided for mission accomplishment while ensuring proper treatment in accordance with international standards.

In Somalia, U.S. forces faced a unique situation.[220] When they arrived, a functioning government infrastructure did not exist.[221] Somalia was a country in chaos and anarchy.[222] To address this void, the peace operation forces established policies and procedures enabling them to accomplish the mission yet ensure adherence to international requirements.

The legal authority for civilian detentions in Somalia depended on the *de facto* sovereignty of the peace operation forces, the "all necessary means" language from applicable UNSC Resolutions, and "a requirement under customary international law to investigate, arrest, and detain, where appropriate, those who commit crimes against humanity or willfully kill or torture protected persons."[223] Detainees had minimum due process rights, which the judge advocates believed included understandable notice and a trial as rapidly as possible.[224] The judge advocates felt that once under U.S. care, detainees "must be treated humanely even when they are transferred to another entity (a situation analogous to prisoner of war requirements under the Geneva Convention Relative to the Treatment of Prisoners of War).[225] This analogy also provided many of the requirements in the standard operating procedures, to include certain requirements providing for the well being of the detainees and a provision allowing that the detainees could be required to work.[226]

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[220] See discussion *supra* Section IV(B)(1).

[221] *See* BLUE HELMETS, *supra* note 98, at 287–90.

[222] Restore Hope AAR, *supra* note 192, at 3.

[223] *Id.* at 25 – 26.

[224] *Id.* at 26. U.S. forces also considered segregation by gender, age and clan even though not required. *Id.*

[225] *Id.* at 26. This mitigated against transfer back to Clan Elders and led to higher standards for initial detainment. *Id.*

[226] To provide for the necessary treatment, the Somalia Detention Standard Operating Procedure required that:

Due to the mission requirements, the U.S. military constructed a detention facility that would hold up to 100 detainees.[227] Eventually, a rudimentary justice system developed in Mogadishu and "detainees were taken to the Mogadishu Central Prison where trials were conducted three days a week."[228]

The Commander of UNITAF approached the issue of civilian detainees by establishing a policy that would minimize the number of cases in which the forces would hold a detainee beyond twenty-four hours. Situations authorizing detention included persons

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> a. All persons captured, interned, or otherwise held in U.S. Army custody will be given humanitarian treatment at all times without adverse distinction based on race, nationality, religion, or political opinion.
> b. Punishment will be administered by due process of law and under legally constituted authority.
> c. Inhumane treatment of confined persons is prohibited under any circumstances and is punishable under national law and the UCMJ.
> d. They will be protected against all acts of violence, insults, public curiosity and reprisal of any kind and acts of violence, bodily injury and reprisal at the hands of fellow detainees.
> e. They will not be subject to medical or scientific experiments.
> f. No coercion of any kind to obtain information may be implicated.
> g. Females will be given treatment as favorable as that given to males.
> h. Commanders are obligated to accept the offer of services of ICRC as a protecting power to ensure humane treatment. ICRC is authorized to visit detainees, interview on conditions of their internment, welfare, and rights and may not be denied except for imperative military necessity.

United States Army, 720th Military Police Battalion, Joint Task Force Somalia, Special Operating Procedure for Detainee Confinement Facility, Operation Restore Hope ¶ 8 (n.d.) (unpublished manuscript, on file with Center for Law and Military Operations).

There was no reference, however, to payment for their work in the facility, which a complete application of the Third Geneva Convention would require. *See* GC III, *supra* note 16, art. 62.

[227] Restore Hope AAR, *supra* note 192, at 26. The International Committee of the Red Cross eventually certified this facility. Memorandum from Major Richard Gordon, Staff Judge Advocate, to J-3 Plans, Joint Task Force Somalia, subject: After Action Review – SJA Joint Task Force Somalia 25 (31 Dec. 1993) (copy on file with Center for Law and Military Operations) [hereinafter Gordon, Somalia AAR]. The standards used were those contained in Military Police publications and field manuals. *Id.*

[228] Gordon, Somalia AAR, *supra* note 227, at 5.

suspected of crimes of a serious nature (murder, rape, etc.) and those who had attacked UNITAF forces and whose immediate release would likely endanger UNITAF forces or innocent third persons.[229] The UNITAF Chief of Staff conducted a probable cause determination and had to approve any detentions in excess of twenty-four hours.[230]

After the transfer of authority to UNOSOM II, the Commander of those U.N. forces issued guidance authorizing the detention of civilians in certain circumstances. He authorized the detention of any civilian suspected of committing serious crimes or of committing violent crimes against UNOSOM II, or of any civilian that posed a threat to UNOSOM II forces or persons under the protection of UNOSOM II.[231] In addition, any subordinate commander had a limited authority to detain civilians, but the detention was not to exceed twenty-four hours.[232] These subordinate commanders were also responsible for protection, food, shelter, and any necessary medical care for detainees.[233] Any detention over forty-eight hours required the approval of the Force Commander or his designee and

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[229] Restore Hope AAR, *supra* note 192, at 25; Memorandum from Major Walter G. Sharp, Sr. for 10th Joint Chiefs of Staff Military Operations and Law Symposium, subject: Operation Restore Hope 16 (11 May 1993) (copy on file with Center for Law and Military Operations).

[230] Restore Hope AAR, *supra* note 192, at 25.

[231] Message, Lieutenant General Cevik Bir, Force Commander United Nations Operation in Somalia, subject: UNOSOM Detention Facility Standard Operating Procedure, ¶ 7(1) (10 Sept. 1993) (copy on file with Center for Law and Military Operations). He authorized the detention of: 1) Individuals suspected of serious violations of Somali or international law (e.g. murder, attempted murder, torture, rape, or aggravated assault); 2) Individuals whose release immediately following a hostile encounter would likely endanger UNOSOM forces or persons under the protection of UNOSOM forces; and 3) Individuals suspected of violent crimes against UNOSOM forces. *Id.*

[232] *Id.* ¶5

[233] *Id.*

received a review every fourteen days.[234] The command policy also specifically permitted the ICRC to inspect any detention facility upon request.[235] Other significant provisions allowed detainees to work to ensure the health and safety of the detention facility[236] and required the separation of female detainees and children less than twelve years of age from the adult male detainees.[237]

U.S. forces in Haiti confronted a slightly different environment from that in Somalia, but they knew the issue would arise and began planning early in the process for detainees.[238] While a police force and judicial system existed in Haiti, both were widely corrupt and did not meet minimum international standards.[239] In addition, the international legal authority for the Multi-National Force clearly provided authority to detain individuals in certain circumstances.[240] To justify any detention, the detainee must either present a threat to the Multi-National Force or must have committed serious criminal acts in the presence of Multi-National Force personnel.[241] A judge advocate review of the detention would occur within seventy-two hours of the detainee's arrival at the Joint Detention Facility and a determination

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[234] *Id.* ¶8.

[235] *Id.* ¶13.

[236] *Id.* ¶10(f).

[237] *Id.* ¶10(h).

[238] Office of the Staff Judge Advocate, 10th Mountain Division (Light Infantry), Operation Uphold Democracy, Multinational Force Haiti After-Action Report, 29 July 1994 – 13 Jan. 1995, at 7 (n.d.) (Judge advocates based the analysis on previous operations in Grenada, Panama, and Somalia) (copy on file with Center for Law and Military Operations) [hereinafter MNF Haiti AAR].

[239] HAITI LESSONS LEARNED, *supra* note 118, at 63.

[240] *Id.* at 63 (citing UNSC Resolution 940).

[241] MNF Haiti AAR, *supra* note 238, at 8.

made regarding further detention at that time.[242] Any continued detention required a finding that the detainee threatened essential civic order, posed a threat to U.S. forces/protected persons/key facilities/mission essential property, committed a serious crime, or possessed valuable information regarding someone still at large that committed one of the previous offenses.[243] As an added protection, an independent judge advocate interviewed each Haitian detainee to gather information that might rebut the circumstances of the detention.[244] The Haitian detainees also received medical treatment as necessary and "given that the Geneva Conventions served as the baseline for treatment, detainees would receive a level of care equal to that provided U.S. service members."[245] U.S. forces also allowed the detainees to see family members on a limited basis and obtain private legal counsel.[246] Similar to the

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[242] HAITI LESSONS LEARNED, *supra* note 118, at 68 (the Multi-National Force established the procedures by considering treatment similar to prisoners of war, due process protections of human rights instruments, and also considering the system under Haitian law.).

[243] *Id.* at 68–69. Detention rested on the following grounds:

> 1) the individual is a member of the Haitian military or police or is armed, and threatens essential civic order;
> 2) the individual poses a threat to United States forces, other protected persons, key facilities, or property designated mission-essential by the Combined Joint Task Force Commander;
> 3) the individual has committed a serious criminal act meaning homicide, aggravated assault, rape, arson, robbery, burglary, or larceny; and
> 4) the individual has valuable information pertaining to individuals not yet detained to whom one or more of grounds 1 through 3 apply.

Id. The Multi-National Force lawyers understood the unique nature of the fourth ground and based it on the "all necessary means" language in Resolution 940 and the exceptional circumstances. Detention on this ground was to be as brief as possible in light of the Haitian Constitution. *Id.* at 69 n.226.

[244] *Id.* at 69. They did not form a formal attorney client relationship. *Id.*

[245] *Id.* at 66.

[246] *Id.* at 69 – 70.

detention facility in Somalia, forces in Haiti granted access to the Joint Detention Facility to the ICRC.[247]

The situation faced by U.S. forces deploying to Bosnia and Herzegovina appeared to be a mix between the issues faced in Somalia and those faced in Haiti. These judge advocates entered a country with numerous levels of governments in place; however, effectiveness was sporadic, and ethnic discrimination permeated many of these institutions. Even though Bosnia and Herzegovina was just emerging from years of armed conflict and these institutions were not up to international standards, these were the official institutions of a sovereign nation and deserved respect as such. Despite this fact, IFOR/SFOR forces detained civilians in certain circumstances in order to accomplish the mission. The presence of a more developed national public safety system (which was closely monitored by the U.N. sponsored International Police Task Force) mitigated against the military forces detaining any civilians for any more than a very short period (usually until the local police arrived). In fact, the NATO Operational Plan required IFOR to turn over detained civilians as quickly as practicable to local authorities, and mandated a legal review for anyone held over seventy-two hours.[248] Legal authority existed for IFOR to detain civilians if they "obstructed friendly forces, interfered with the mission, or committed a serious crime in the presence of IFOR."[249]

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[247] *Id.* at 70 (The International Committee of the Red Cross praised the Joint Detention Facility and remarked that the procedures established provided Haitians with their first lesson on fairness and due process).

[248] BALKAN LESSONS LEARNED, *supra* note 82, at 109 –10 (noting this was derived from Western, not Bosnian law).

[249] *Id.* at 110. IFOR/SFOR also detained civilians for up to seventy-two hours if the person was collecting information on U.S. forces and, thus could present a threat to the military. *See* Office of the Staff Judge Advocate, V Corps, Operation Joint Endeavor After Action Review, (24 Apr. 1997) (unpublished transcript, on file with Center for Law and Military Operations).

Despite the fact that an international armed conflict existed in Bosnia and Herzegovina, NATO personnel in Bosnia and Herzegovina were not parties to the conflict, and therefore, any detainees were not officially prisoners of war.[250]

While the requirement to turn civilians over to the local authorities as soon as possible potentially helped the local government reassert its authority and regain its proper role, this practice presented several problems. First, NATO forces could lose the opportunity to keep custody of the offender and thus make is easier to ensure punishment and deterrence.[251] In addition, significant concerns arose when local authorities were hostile to the detainee. This became a significant issue when IFOR detained seven Bosnian Muslim men who turned themselves over to IFOR early in the mission. IFOR promptly released these men to the local authorities, who were in the Serb dominated Republika Srbska. After IFOR turned the men over to the local Serbian authorities, the Serbs proceeded to torture confessions out of several of them.[252]

Upon the arrival of the peacekeeping forces in Kosovo, the situation resembled Somalia more than Bosnia and Herzegovina, even though Bosnia and Herzegovina and Kosovo are in the same Balkan region. The lack of a functioning government compelled the NATO forces in Kosovo to deal extensively with the detention of civilians. The detention policy for KFOR evolved over time, but has always considered a balance between two competing

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[250] BALKAN LESSONS LEARNED, *supra* note 82, at 109.

[251] 1st ID AAR, *supra* note 198, at 14–15.

[252] See BALKAN LESSONS LEARNED, *supra* note 82, at 111–12.

requirements: the observation of human rights and KFOR's mandate to provide a safe and secure environment in the country.[253] The detention policy's initial aim was to develop a system designed to make an initial determination whether just cause existed to continue detention until the U.N. could establish a working legal system and try the detainee under the local laws.[254] In determining the quality of treatment for the detainees, the judge advocates in Kosovo used the standards found in the Third Geneva Convention.[255] KFOR commanders and soldiers had the authority to detain civilians for unlawful or unauthorized conduct.[256]

In order to address the distinctly civilian-like authority to detain criminal suspects, the KFOR Commander established a policy, that provided a list of crimes included in three separate categories.[257] In recognition of the sovereignty of Kosovo, the policy documented

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[253] Command Policy Memorandum #4, Headquarters Task Force Falcon, subject: Detention Policy, ¶ 2 (24 Jul. 2000). [hereinafter Kosovo Detention Policy]. This policy memorandum derives largely from previous versions dated December 12, 1999, November 4, 1999 and August 3, 1999. The memoranda are largely similar with a few substantive changes in criminal categories and a shift from a legal review within forty-eight hours in the August 3, 1999 version to the seventy-two hour timeframe in the one dated December 12, 1999. *See* Command Policy Memorandum #4, Headquarters Task Force Falcon, subject: Detention Policy (12 Dec. 1999) (copy on file with Center for Law and Military Operations), Command Policy Memorandum #4, Headquarters Task Force Falcon, subject: Detention Policy (4 Nov. 1999) (copy on file with Center for Law and Military Operations), Command Policy Memorandum #4, Headquarters Task Force Falcon, subject: Detention Policy (3 Aug. 1999) (copy on file with Center for Law and Military Operations). The change from forty-eight hours to seventy-two hours for the review occurred after KFOR attorneys learned that seventy-two hours was the requirement under Yugoslavian law. USAREUR Kosovo AAR, *supra* note 168, at 458.

[254] USAREUR Kosovo AAR, *supra* note 168, at 458.

[255] *See id.* at 373.

[256] Kosovo Detention Policy, *supra* note 253, at ¶ 3. Unlawful conduct concerned criminal behavior as defined by applicable local laws. *Id.* at ¶ 3(a). Unauthorized conduct addressed more operational reasons, such as posing a threat to a safe and secure environment. *Id.* at ¶ 3(b).

[257] The delineated categories and their respective crimes were:

a. Category I:

(1) War crimes
(2) Any ethnically motivated crime
(3) Hostile acts or threats toward KFOR

the unlimited authority of an international judge or a local magistrate to order the release of a detainee.[258] A review by one of these two authorities was required within seventy-two hours of the initial detention.[259] In addition, while pending this independent review by civilian

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(4) Murder and attempted murder
(5) Kidnapping
(6) Aggravated Assault with a Dangerous Weapon
(7) Armed Robbery

b. Category II: Serious Crimes

(1) Rape
(2) Arson
(3) Larceny or looting equal to or greater than DM 1000.00
(4) Burglary and housebreaking
(5) Possession of illegal drugs in a quantity that implies an intent to sell or distribute
(6) Any crime committed by a suspect previously detained by KFOR (repeat offenders)
(7) Any crime, other than a Category I crime, in which a weapon was used in the commission
of the crime
(8) Weapons violations
(9) UCK uniform violations
(10) Establishing an unauthorized checkpoint
(11) Intimidation, harassment, communicating a threat, and provoking speech

c. Category III: Standard Crimes

(1) Larceny or looting less than DM 1000.00
(2) Curfew violations
(3) Simple assault (no weapons involved)
(4) Driving under the influence of alcohol or drugs
(5) Possession of illegal drugs in a quantity that implies personal use, rather than intent to sell
or distribute
(6) Possession of stolen property
(7) Black marketing
(8) Auto theft
(9) Drunk and disorderly
(10) Traffic violations
(11) Unlawful destruction of property

Id. at ¶ 5.

[258] *Id.* at ¶ 4. The Commander, KFOR, however, was able to hold any person based upon strong evidence that the person presented a threat to the safe and secure environment. *See id.* at ¶ 9.

[259] *Id.* at ¶ 8(a).

authorities, a judge advocate looked at each detainee's record and determined whether probable cause existed to justify continued detention.[260] By December 2000, however, detentions by KFOR based upon criminal conduct had almost totally ceased.[261]

In addition to the authority to detain civilians based upon the suspected commission of a crime, KFOR exercised the authority to detain civilians that threatened the peace and stability of the environment.[262] KFOR exercised this authority for military reasons, i.e. force protection, but could also use it to continue the detention of civilians released by the local government for illegitimate reasons, i.e. ethnic bias.[263]

Forces in peace operations consistently confront issues surrounding the detention of civilians within the area of operations. This issue arises whether or not there is a functioning local government. The legal authority for the detentions often derives from the UNSC resolution, which grants the authority under Chapter VII of the U.N. Charter to do all that is necessary and proper to accomplish the assigned mission. U.S. forces have often concluded that the temporary detention of civilians is necessary to establish a safe and secure

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[260] *Id.* at ¶ 8(b). The judge advocate forwarded any finding of insufficient evidence to the appropriate military release authority. *Id.* The category of the alleged crime determined the appropriate release authority. *See Id.* at ¶ 5.

[261] *See* Videotape: Center for Law and Military Operations, Video-teleconference with Office of the Staff Judge Advocate, 1st Infantry Division, subject: Task Force Falcon, (12 Mar. 2001) (on file with Center for Law and Military Operations).

[262] *See* USAREUR Kosovo AAR, *supra* note 168, at 64–67. Exercise of this authority, however, requires clear evidence that the individual is a direct threat to a safe and secure environment. *See* Memorandum for Record, Major Daniel W. Kelly, Command Judge Advocate, Task Force Falcon, subject: Implementing UNMIK Regulation 1999/2 (29 Jun. 2000) (copy on file with Center for Law and Military Operations).

[263] *See generally* USAREUR Kosovo AAR, *supra* note 168, at 64–67; Kelly Memo, *supra* note 262.

environment. As demonstrated above, however, this is not an absolute power and U.S. forces based detentions on evidence of certain prohibited conduct.

Neither international nor U.S. law provides clear guidance for judge advocates in addressing the issues surrounding the detention of civilians during a peace operation. As a result, judge advocates have frequently turned to the principles and spirit of the Law of War in accordance with U.S. policy and used the treatment of enemy prisoners of war as an analogous situation. The discussion above shows the relatively clear correlation between the Law of War applicable to enemy prisoners of war and the detention of civilians in a peace operation, but identifies some limits. United States forces dealing with the detention of civilians have repeatedly looked to the Third Geneva Convention to determine what procedures to use and the proper standards for treatment and facilities.[264] Not all the articles of the Third Geneva Convention translate easily into the context of peace operations. For example, Article 12 could present an issue of liability for the U.S. regarding the deaths and maltreatment of the Muslim men if directly applied to the transfer of the detained Bosnian Muslims to the Bosnian-Serb authorities discussed above.[265] The articles which translate most easily into peace operations and which U.S. forces historically have applied during peace operations include provisions that address the general health and welfare of prisoners, recognize fundament human rights of detainees, and recognize fundamental requirements for

[264] See discussion *supra* nn. 225–26, 242, 245, and 255.

[265] See *supra* note 252 and accompanying text.

the operation of a detention facility.[266] The specific articles not often applied to the detention of civilians during peace operations generally have distinctly military characteristics.[267]

In addition to the guidance found in the Third Geneva Convention, the general principles of the Law of War provide limited guidance for the judge advocate analyzing a proposed policy concerning the detention of civilians during a peace operation. Military necessity, humanity, distinction, and proportionality each provide some guidance, but the limitations of the peace operation environment present obstacles for their direct application.

As with the analysis of humanitarian and civic assistance, application of the principle of military necessity answers the fundamental question of whether the detentions are necessary and, therefore, permissible. If detaining the civilians would not facilitate the mission of the

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[266] Specific provisions mentioned during or apparent from an analysis of the above operations include: the use of a tribunal to assist in determining the status of the detainee, GC III, *supra* note 16, art. 5; the ability of the ICRC to have access to the detention facility and undertake activities on behalf of the detainees, *id.* art. 9; humane treatment and protection from violence, *id.* art. 13; respect for the persons and honor of the detainees to include due regard for women, *id.* art. 14; provision of medical care, *id.* art. 15; non-discrimination based upon race, nationality, religion or political opinions, *id.* art. 16; requirement to remain within a certain camp/confined area, *id.* art. 21; quarters under conditions as favorable as those for the forces of the Detaining Power in the same area and the provision of separate facilities for females, *id.* art. 25; provision of food and water, *id.* art. 26; general sanitary conditions, *id.* art. 29; infirmary for medical care, *id.* art. 30; some types of work by detainees is permitted, *id.* art. 50.

[267] Examples include the rule that a prisoner can only be required to give name, rank, date of birth, and serial number, *id.* art. 17; detainees put under the authority of the senior commissioned officer detainee, *id.* art. 39; disparate treatment is permissible based upon rank of the detainee, *id.* arts. 44 – 45; provision of monthly advance of pay, *id.* art. 60; appropriate pay for labor by detainees, *id.* art. 62;maintenance of a pay account for each detainee, *id.* art. 64; the ability to send and receive mail, *id.* art. 71; election of prisoner representatives, *id.* art. 79; and those covering the repatriation of the prisoners after the close of hostilities, *id.* art. 118–119.

The application of the articles in Chapter III (Penal and Disciplinary Sanctions) of the Third Geneva Convention is especially problematic. U.S. forces establish certain rules that detainees must follow in the detention facilities, which is analogous to this chapter. Other articles, however, such as that providing for jurisdiction under the law of the armed forces of the detaining power and for trial by a military court could not apply to civilian detainees during peace operations. *See* UCMJ art. 2 (2000).

U.S. military forces, then no justification for those detentions exists. To reach this use of the principle, however, requires a change in the definition to account for the different circumstances (there is no "enemy" and the mission is not the "complete submission" of an opposing armed force).[268]

The principle of humanity reminds U.S. Forces that certain limitations constrain the conduct permitted in accomplishing their military mission during combat. This is also true in a peace operation. An analogy to the prevention of "unnecessary suffering" that may result from military operations could provide guidance requiring detentions be based on some level of credible evidence and prohibit blanket or arbitrary detentions. Commanders must also give due consideration to those affected by their decisions, i.e. provision of adequate facilities for all detainees. Use of the principle of humanity, through the "application of usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience"[269] could also serve to prevent the use of necessity to the point of excessive detentions in a manner similar to *kriegsraison.*[270]

Applying the principle of distinction to detainees partially revisits the discussions of both military necessity and humanity. Since the "target" of the military decision is a civilian, a strict application of the traditional definition of distinction is impractical. Adjusting to the spirit of the principle, however, yields some assistance. Just as any lawful targeting during combat must distinguished between a "military objective" and civilians and their property,

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[268] *See* discussion *supra* Section III(A).

[269] Hague IV, *supra* note 28, at pmbl. See discussion at note 48 and accompanying text.

[270] See discussion *supra* nn. 42–43 and accompanying text.

military forces "targeting" a detainee must focus on a legitimate "objective." The distinction should be between civilians that commit an act justifying detention (a legitimate objective based upon the mission) and civilians that do not commit such an act.

The judge advocate should also consider the underlying spirit of the principle of proportionality. When conducting detention operations, military forces should not use an undue amount of force to accomplish the mission. In addition, while little likelihood of destruction or damage to civilian property exists, the spirit of proportionality requires that any detention operations must not excessively interfere with the non-offending civilians in the area of operations.

C. Searches

In almost any peace operation, forces confront the issue of searching persons along with private residences and automobiles. Most often, these forces search for weapons or other contraband based upon the suspected violation of criminal laws or a threat to the military force. In each of the recent peace operations, U.S. forces conducted searches that required a balance between the need to conduct the search and minimum standards of due process and human rights.

The need to conduct searches for weapons in Haiti arose early because of the threat to the secure environment and the members of the Multi-National Force. The judge advocates advised the force commander to authorize searches of private residences and cited the

authority from the UNSC Resolution 940, which authorized the Multi-national Force to use all necessary means to accomplish the mission (to include establishing a safe and secure environment).[271] Judge advocates, however, recognized the continuing application of local laws. These laws included the Haitian Constitution, which grants the right to Haitian citizens to bear arms as long as they follow certain procedural requirements.[272] In the end, the approach to this issue considered these competing factors and permitted searches as necessary but allowed Haitians to maintain individual small arms in their homes for security purposes.[273]

This issue arose again concerning the confiscation of weapons that posed a threat to the Multi-National Force. After weighing the threat to the peace operation forces with the rights of the Haitians, the Multi-National Force Commander determined that possession of automatic weapons by private Haitian citizens posed a threat and, therefore, military forces could seize them.[274] The Multi-National Force also conducted searches of automobiles for weapons, but it balanced this with the right to bear arms for personal security under the Haitian Constitution.[275] Acting under the authority of the UNSC resolution and the mission to provide a safe and secure environment, the Multi-National Force created a profile used to

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[271] HAITI LESSONS LEARNED, *supra* note 118, at 77.

[272] *Id.*

[273] *Id.*

[274] MNF Haiti AAR, *supra* note 238, at 6.

[275] *Id.*

screen autos passing through checkpoints. This profiling attempted to identify potential paramilitary group members and subjected their autos to searches for weapons.[276]

NATO forces in Bosnia and Herzegovina also confronted the issue of searching for weapons. For these forces, the GFAP clearly granted the authority to conduct a search, but the fact that Bosnia and Herzegovina continued to have a viable police force and legal system presented overlapping authorities. The challenge was to "simultaneously inculcate in the populace a respect for the rule of law while at the same time, under the GFAP, do what was necessary to fulfill the mission and protect ourselves."[277] Forces under 1st Infantry Division concluded that probable cause or reasonable suspicion standard did not apply to random automobile searches as done in Haiti. They instead based such searches solely on the need for force protection and mission accomplishment.[278]

In contrast, when troops from the 10th Mountain Division arrived the command noticed several instances where SFOR troops from different nations conducted searches of private residences without any apparent suspicion regarding those particular homes.[279] The practice resulted in the search of all homes in the area where a patrol was operating solely because the patrol happened to be in that area or all homes within a several block area based upon a general suspicion of illegal weapons in that area. After consultation with other troop-

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[276] *Id.*

[277] 1st ID AAR, *supra* note 198, at 14.

[278] *Id.*

[279] *See* Office of the Staff Judge Advocate, 10th Mountain Division (Light Infantry), After Action Review for Task Force Eagle, subject: Searches by SFOR, (n.d.) (copy on file with Center for Law and Military Operations).

contributing nations, the 10th Mountain Division Commander, acting in his position as the Task Force Eagle Commander, issued a policy memorandum establishing standards delineating when forces under that command could conduct a search of a private residence. The standards considered when drafting this memorandum included those under U.S. laws and international conventions such as the Universal Declaration of Human Rights[280] and the European Convention on Human Rights.[281]

The policy memorandum identified the clear authority of SFOR to conduct searches of private residences under the GFAP. Based upon the wording of the GFAP and the fundamental human rights of those being searched, the policy authorized searches only when there was suspicion of a military capability, a threat to SFOR or Persons with Designated Special Status, or the occupants consented.[282] This search policy not only helped to clarify when SFOR could search a residence, but it also helped to advance the respect for the rule of law in Bosnia and Herzegovina.

Similar search issues arose for U.S. forces in Kosovo; however, because KFOR operated more directly in performing police functions these issues were significant. The Command Judge Advocate wrote a memorandum indicating the approach U.S. forces took with respect

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[280] See *supra* note 188 and accompanying text.

[281] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221. This was because many other troop contributing nations in SFOR were bound by this Convention and required to apply its protections to the citizens of Bosnia and Herzegovina and the fact that Bosnia and Herzegovina declared in the GFAP that it would follow this Convention. AAR, subject: Searches by SFOR, *supra* note 279.

[282] Command Policy Memorandum, Task Force Eagle, subject: Searches of private residences in MND(N), ¶ 3 (Dec. 1999) (on file with Center for Law and Military Operations). The memorandum prohibited random searches and required credible information about a specific location or consent gained without coercion or intimidation. *Id.* at ¶ 4.

to searches in Kosovo. This memorandum details the analysis a commander should use in determining if sufficient justification exists to conduct a search of a Kosovar home.[283] The primary focus of the memorandum ensured that soldiers performing police type functions did not enter Kosovar citizens' homes without a probable cause determination made by the commander.[284] U.S. forces in Kosovo exercised the authority to conduct searches based not only upon this probable cause determination, but also for border searches, checkpoint searches and gate searches when looking for weapons, ammunition, military equipment or contraband.[285] Soldiers also exercised the authority to conduct searches based on exigent circumstances (hot pursuit or when delay in obtaining a search authorization would result in the removal, destruction, or concealment of the property or evidence sought) or when searching for individuals who had fired on KFOR.[286]

In Somalia, Haiti, Bosnia and Herzegovina, and Kosovo, peace operation forces exercised their authority to conduct searches of citizens' homes or automobiles. The legal authority for searches derives from the mandate for the operation provided in the UNSC Resolution authorizing the use of "all necessary means." Searches for weapons are frequently necessary to accomplish the mission of establishing a safe and secure environment and to protect the force. Other considerations, however, limit this power. One must consider

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[283] Memorandum from MAJ Michael J. Henry, Command Judge Advocate, to Task Force Falcon, subject: Fact Sheet on Probable Cause Determinations to Search and Seize, (5 Sept. 1999) (enunciating a probable cause determination similar to that done under U.S. law and several exceptions to the probable cause requirement, for example, consent and searches incident to arrest) (copy on file with Center for Law and Military Operations).

[284] Memorandum from MAJ Michael J. Henry, Command Judge Advocate, to Task Force Falcon, subject: Additional Guidance on Conducting Searches, (10 Sept. 1999) (copy on file with Center for Law and Military Operations).

[285] *Id.*

[286] *Id.*

the respect for applicable fundamental human rights including the reasonable guarantee of privacy when developing a standard to authorize these searches.

As with the issues of humanitarian and civic assistance and detainees discussed above, there is little to no international or U.S. law that directly addresses conducting searches during a peace operation. As a result, judge advocates have again turned to the general principles of the Law of War. Similar to their inability to address the issues surrounding detainees, the four principles of the Law of War do not apply neatly to the conduct of searches during peace operations. Applying the underlying spirit of the principles, however, yields some assistance for judge advocates, but requires a distortion of that principle's definition and focus.

The principle of the military necessity helps to answer the fundamental question of whether the search is even necessary to accomplish the mission. The definition of military necessity must, however, be distorted to account for the non-combat nature of the mission. The "destruction of the enemy" must change into the "search." Under this altered principle of military necessity, if no need to conduct a search of the house or vehicle exists in order to facilitate the mission of the military forces, then no justification for the search exists and it may not be conducted. Without necessity and justification, the search is impermissible.

The principle of humanity provides some limited help in defining the limits of permissible conduct during a search. The requirement to minimize unnecessary suffering could be used to obligate the military to not unnecessarily interrupt the property or persons

during the search itself. This principle could also translate into a requirement that the U.S. forces conducting the search take care such that the civilian residence and property is not unnecessarily disrupted during the search.

The principle of distinction assists with searches in a peace operation in a way similar to its assistance with respect to civilian detainees. Traditional notions of distinction simply cannot apply to operations where civilians often are the objects of the mission. Applying the spirit of the principle, however, allows for a "distinction" between legitimate searches based upon some credible reason or evidence and searches based upon whim. This bolsters the application of military necessity and humanity to searches by providing additional reasons to prevent searches without proper justification.

Proportionality assists with searches in peace operations by requiring consideration of collateral issues. Even though no damage or destruction of civilian property would likely occur, U.S. forces must consider the impact their searches might have on those civilians in the area who are not the subject of the search and ensure that any side effects are not excessive to the military objective of the mission. These side effects could include destruction of property incident to the search, the impact on freedom of movement and other "normal daily activities."

VII. Principles of the Law of Humanitarian Operations

The analysis of humanitarian and civic assistance, detainees, and searches demonstrates the extent to which judge advocates in past operations have needed to turn to the principles and spirit of the Law of War due to a lack of international or U.S. laws that address the issues. Frequently, however, the use of traditional definitions of the principles of the Law of War fail to address questions that do not involve the use of force. This type of question forms a large majority of the issues faced by judge advocates in a peace operation.[287] Attempts by judge advocates to apply the U.S. policy requiring the application of the "principles and spirit" of the Law of War, forced them to distort the principles of the Law of War whenever the issues did not include the use of force. To correct this, U.S. policy should recognize an alternate set of principles that more readily addresses the laws applicable to common questions found in non-use of force issues during peace operations. These principles should only apply, however, to the legal analysis of issues not involving the use of military force and would displace the need to consider how the principles and spirit of the Law of War applies to these questions. United States policy must continue to recognize that

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[287] 1st IDAAR, *supra* note 198, at 35; BALKAN LESSONS LEARNED, *supra* note 82, at 53–55; *See* Restore Hope AAR, *supra* note 192 (majority of discussion throughout the after action review relates to non-use of force issues); MNF Haiti AAR, *supra* note 238 (a large majority of the AAR covers non-use of force issues). Another author reiterates the point that this policy presents more questions than answers. He writes:

> From operations in Grenada to the former Yugoslavia, U.S. commanders and judge advocates grappled with complex issues of whether the law of war applied during Military Operations Other Than War. If nothing else, these operations illustrate that the questions of applying the law of war vastly outnumbered the answers provided by the U.S. law of war policy.

Buhlman, *supra* note 7, at 173.

the principles and spirit of the Law of War apply to any use of military force in a peace operation.[288]

Four legal principles that will accomplish this goal for non-use of force issues are operational necessity, humanity, legitimacy, and complementarity. These four principles provide a base line that will frequently help the judge advocate provide an answer in a quick, direct manner. By using these principles as a framework, a judge advocate will be able to consider all applicable bodies of law in addition to other significant considerations without trying to decipher which rules of the Law of War might apply and how to distort or manipulate those rules to reach a practical and legally sufficient answer. These four principles constitute the "Law of Peace Operations."[289]

This set of principles of the Law of Peace Operations cannot act as a substitute for a commander's exercise of discretion based upon competent legal advice.[290] This list merely serves as a tool, which judge advocates can use to accomplish their mission. Just as military necessity, humanity, distinction, and proportionality inform the commander and the judge

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[288] This is generally in accord with the Secretary General's Bulletin, which seems to limit the application of the enumerated principles to situations in which U.N. forces are "actively engaged" as combatants and in self-defense. See discussion *supra* note 202 and accompanying text. At the point that U.S. forces become active belligerents in an international armed conflict, the full body of the Law of War would apply as a matter of law. *See, e.g.*, GC I, *supra* note 16, art. 2; *see also* MCCOUBREY AND WHITE at 206 – 207; ICRC SYMPOSIUM, *supra* note 86, at 62 (Statement of Major-General Louis Geiger, ICRC Adviser to the Armed Forces). *But see* Buhlman, *supra* note 7 (article addresses the ambiguity in current U.S. policy applying the principles and spirit of the Law of War to military operations other than war).

[289] This term derives partly from the use of the term "law of humanitarian operations" by members of the 10th Mountain Division (Light Infantry), *see* Restore Hope AAR, *supra* note 192, at 3.

[290] *See* 1st ID AAR, *supra* note 198, at 8 ("Discretion is best exercised when a comprehensive assessment of the situation is made. As judge advocates, we must promote the exercise of judgment from within individuals, rather than the quest for empirical answers from an outside source.").

advocate as they accomplish their mission during armed conflict, these principles can serve that same audience during a peace operation. These principles provide a more defined framework for analysis without unnecessarily restricting the legal options available to the military commander.

These four principles facilitate providing substantive advice to commanders without attempting to delineate rules that may be too restrictive for the fluid environment frequently present in peace operations. They incorporate legal and significant non-legal factors that influence a commander's decision. Commanders (and lawyers) frequently prefer law that is clear and easily applied to the situations they face. Some argue that this desire compels a search for and development of specific rules, which might ill serve U.S. forces on a peace operation.[291] There is merit to maintaining some "freedom of movement," but U.S. forces in a deployed environment require something more defined than the current policy of filling the legal void by picking and choosing between the rules of the Law of War and attempting to apply necessarily distorted definitions of the "principles and spirit" of the Law of War. Purposeful ambiguity may serve the goal of not unduly tying a commander's hands, however, such an approach can have detrimental side effects, such as undermining the U.S. role in developing international law.[292] Application of these four principles of the Law of Humanitarian Operations fills this void without unnecessary specificity. It recognizes existing laws without compounding the considerations a judge advocate should incorporate

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[291] *Id.* at 8–9; *see also id.* at 15 ("In scenarios such as the legitimate implementation of international peace agreements like the GFAP, commanders must discard the search for a comforting yes/no regulatory answer. Under the GFAP, our authority is so broad that such answers, while comforting, do not exist. Discretion based in character and values provides the answers."); USAREUR Kosovo AAR, *supra* note 168, at 380 – 381.

[292] *See* Buhlman, *supra* note 7, at 178; Turley, *supra* note 6, at 170.

into providing legal advice to the commander. These principles do not necessarily add laws that a judge advocate must consider, but provide a framework for a comprehensive legal analysis.

The following sections discuss the four principles of the Law of Peace Operations. While examples follow the description of a few of the principles, one principle alone seldom provides the answer to an issue. The final section, therefore, presents a general discussion of humanitarian and civic assistance, detainees, and searches and how these four principles can assist the judge advocate in providing appropriate legal advice to the commander.

A. Operational Necessity

The first principle of the Law of Peace Operations is operational necessity. Its genesis clearly derives from the principle of military necessity. The analysis of military necessity, as it pertains to the common issues faced in peace operations, demonstrated the relatively direct translation of this principle into peace operations. The slight change in semantics recognizes that while the concepts are closely related, their context and application differ. Operational necessity encapsulates the commander's authority to use all measures that are indispensable for fulfilling the unit's mission in a peace operation, which are not otherwise prohibited by applicable international or national laws.

This principle consists of two prongs of analysis. First, the proposed mission must be required to accomplish the military unit's mission. Just as a commander must base a unit's

actions in combat in the stated mission, a commander must base a unit's actions in a peace operation on the stated mission/mandate for that operation. The change from "military" to "operational" merely recognizes that not all tasks performed by a military unit during a peace operation will be distinctly military in nature. The second prong of this analysis requires the judge advocate to consider applicable international, foreign, and U.S. laws. This aspect will relate closely with other principles, but is a necessary step in the initial stages of analyzing a proposed mission because a law specifically prohibiting the proposal will obviate the need for further analysis without significant changes.[293] For example, assume there is a proposed project to improve a road during a peace operation. The first question is whether the road is necessary for accomplishing the military mission of the unit. If it is, then the analysis turns to the second prong, which is not likely to present any prohibitory laws on point. On the other hand, if the road improvement project is for the benefit of the local population, the question will turn on the application of specific U.S. fiscal laws.[294]

In the past, members of the military misinterpreted and abused the principle of military necessity.[295] As a result, some academics consider military necessity as "something that must be overcome or ignored if international humanitarian law is to develop."[296] Those that hold such a position forget, however, that the principle originally developed to limit military action and should view it as a significant legal restraint until more specific treaty rules or

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[293] One exception to this may be application of complementarity to refer the proposal to another agency that is able to accomplish it instead of the U.S. military.

[294] See discussion supra note 208 and accompanying text.

[295] See discussion *supra* Section III(A).

[296] *See* Carnahan, *supra* note 37, at 231.

customs are established.[297] Operational Necessity, as a derivation of the principle of military necessity, recognizes the beginning of such a custom with respect to peace operations.

B. Humanity

The second principle of the Law of Peace Operations is humanity. This principle also finds it roots in the corresponding principle of the Law of War.[298] While the Law of Peace Operations continues the use of the word "humanity," the substance and the application of this principle differ between the two bodies of law. In the Law of War, the principle of humanity prevents unnecessary suffering and places a limit on the conduct of military forces in the absence of a specific prohibition based upon "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."[299]

The essence of this principle in the Law of War serves to remind combatants that they must honor the sanctity and special status of a human life, irrespective of the inhumane nature of war. This recognition of the inherent value of a human life links the principle of humanity in combat and peace operations. Just as the interminable efforts to define the Law of War have helped to make war a bit more humane, the principle of humanity in peace operations must strive not just to delineate the law as it stands, but to make humanity, the

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[297] *Id.*

[298] *See* discussion *supra* Section III(B).

[299] Hague IV, *supra* note 28, at pmbl.

survival of civilization, and the sanctity of the individual human being the compelling considerations.[300] In a peace operation, humanity serves to limit the means that the U.S. military may use to accomplish the mission. This principle of humanity requires that in cases where there is no specific law, the conduct of the military forces remain limited by the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

The application of this principle in peace operations requires the U.S. military forces to consider the legal limits on their operations with respect to customary international law and other principles of a civilized people. At the heart of this principle is the application of fundamental human rights to the operation. It also requires the consideration of other principles applied by civilized people to their society. This includes the notions of justice and certain individual rights, such as freedom of speech and privacy to name a few. The success of a peace mission depends on the peace operation forces recognizing that certain fundamental human rights and other principles of a civilized people govern their conduct. This recognition will not only ensure the legality of their conduct, but also provide an example of the respect for the rule of law, thus contributing to the overarching mission of the peace operation. Just as the U.S. military provided the Haitians with their first lesson in due process,[301] U.S. forces may carry on that role in future operations by applying this principle.

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[300] *See* Lauterpacht, *supra* note 1, at 379 ("The law on these subjects (the law of war) must be shaped – so far as it can be shaped at all – by reference not to existing law but to more compelling considerations of humanity, of the survival of civilization, and of the sanctity of the individual human being.").

[301] See *supra* note 247.

The precise content of this principle presents several significant issues. A determination of which rights are "fundamental" human rights established under customary international law is a difficult task.[302] Even more amorphous, is the second prong of humanity, the principles of a civilized people. This aspect of humanity will not provide the judge advocate or the commander with a list of required considerations. Its function is to ensure the consideration of non-binding legal principles that will assist in accomplishing the mission even though they do not apply as a matter of law. This aspect relies heavily upon the education, experience and wisdom of those involved in the decision and the commander's exercise of discretion based upon competent legal advice.

Application of the principle of humanity during a peace operation is quite distinct from applying Occupation Law, wherein military forces exercise extensive governmental powers and assume many responsibilities under international law.[303] Occupation presupposes a hostile invasion, whether or not resisted, which renders the invaded government incapable of exercising its authority, and the invader must successfully establish its own authority over that of the legitimate government for that territory.[304] Military forces on peace operations, by definition, will not enter a country through a "hostile invasion;" therefore, this body of law cannot apply as a matter of law.[305] This principle acknowledges the duty of U.S. soldiers to

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[302] See discussion *supra* Section V(A)(2).

[303] For a discussion on the content of the Law of Occupation, *see, e.g.,* FM 27-10, *supra* note 34, at ch. 6; GREEN, LOAC, *supra* note 17, at 246–57.

[304] FM 27-10, *supra* note 34, at ¶ 355.

[305] See, O'Brien, *supra* note 165, at 279 (providing divergent views presented at Captain Rockwood's court-martial). *Compare* United States v. Rockwood, No. 9500872 (10th Mountain Div. 22 Apr. & 8-14 May 1995), at 2133-34 (testimony of William H. Parks, Special Assistant to The Judge Advocate General for Law of War Matters, that the United States, the International Committee of the Red Cross, the Aristide government and the

respect the fundamental human rights of the populace. This is not as extensive as the duties owed to citizens by the actual government of a sovereign nation or by an occupying power. Rights involved would not extend to items that have not attained "fundamental" status under customary international law, such as providing an education, clothing, shelter, etc. The military forces may assist in providing for these needs (if permissible under applicable laws) and will often assist indirectly by providing a safe and secure environment in which the other humanitarian agencies can work; however, there is no duty to provide for these needs under international law.

Two examples of the application of this principle will help clarify its meaning. When considering the detention of civilians, U.S. forces have frequently used the analogy to prisoners of war and selected certain articles for application during peace operations. The use of the principle of humanity, which ensures the recognition of the fundamental human rights of the detainees and other principles of civilized peoples, will allow the U.S. forces to meet all international and national legal requirement in a more direct manner. Recognition of the fundamental right against arbitrary and prolonged detention will ensure that U.S. forces based any detentions on certain proscribed conduct. Furthermore, recognition of

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Cedras government all understood that the United States was not an occupying power before United States troops deployed) [hereinafter Rockwood ROT]; Meron, *supra* note 133, at 78 (that the Geneva Conventions were not "strictly speaking, applicable" to United States operations in Haiti) *with* Rockwood ROT at 1924 (testimony of Professor Francis Boyle that, in his opinion, "given the circumstances here where the United States had surrounded Haiti, there was massive overwhelming force there ready to be used, an ultimatum had been given and indeed General Cedras, according to President Carter, capitulated only when he was told that U.S. paratroopers had already been sent on their way and were into their mission, and at that point he capitulated to the ultimatum, . . . and went along with the occupation, and I think that if you read [FM 27-10] it's clear that under those circumstances the laws of war and the other treaties applicable would apply."); Weiner & Aolain, *supra* note 165.

fundamental principles of a civilized society will lead the U.S. forces to ensure that these detainees have adequate food, water, clothing, shelter, and medical care.

Another example of the application of this principle relates to other "freedoms" that are not necessarily fundamental human rights, but are important and recognized by a civilized society. Few specific laws will address the situation of a group of civilians planning a demonstration to protest an action, either of the local government or the U.S. military. The U.S. military may have concerns about the nature of the gathering and potential violence, but in the absence of specific laws, judge advocates and commanders must balance security concerns with fundamental principles such as freedom of assembly and freedom of speech. This will allow the unit to provide a safe and secure environment without unnecessarily restricting these freedoms. This recognition will help to advance the overall mission of the peace operation and help to instill a respect for the rule of law in the local people.

C. Legitimacy

Legitimacy is the third general legal principle in the Law of Humanitarian Operations. Unlike operational necessity and humanity, legitimacy does not derive from the principles of the Law of War, but is "borrowed" from the principles of military operations other than war.[306] This "shared" principle demonstrates the legally intense nature of peace

[306] See *supra* Section IV(A).

operations.[307] During a peace operation, the legitimacy of the mission and the military force can be difficult to attain and more difficult to keep. As a legal principle in peace operations, legitimacy requires the military force to act with total impartiality towards any former belligerents or groups of the populace in the area of operations.

Impartiality is one of the key aspects of this principle. Peace operation forces must be impartial in their approach to the mission.[308] This impartiality must be a matter of practice and perception.[309] With respect to "practice," the U.S. military must remain impartial in all missions that they perform. Non-discrimination is a vital part of impartiality and is especially difficult to establish or maintain when the military uses or threatens the use of force.[310] With respect to "perception," the U.S. military must consider the impacts of their actions on all affected parties.[311]

Impartiality must differ from neutrality. U.S. forces on a peace operation must not be neutral or their presence would be in vain.[312] Neutrality implies a lack of involvement or

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[307] This may be further demonstrated when remembering that during combat, military commanders rely heavily on their staff officers responsible for coordinating various combat powers (i.e. the fire support officer), however, in a peace operation this "inner circle" often consists of the Staff Judge Advocate and the Civil Affairs officer.

[308] See *supra* Section IV(A).

[309] See *supra* note 94 and accompanying text.

[310] ICRC SYMPOSIUM, *supra* note 86, at 54 (Statement by Mr. Toni Pfanner, Head of the Legal Division, ICRC) ("One may ask whether in such circumstances impartial humanitarian activities or support for such activities and necessarily partial enforcement action are indeed compatible or whether they are mutually exclusive.").

[311] This aspect relates directly to the principle of complementarity.

[312] Consider the "action" of members of the U.N. Protection Force in Bosnia and Herzegovina (UNPROFOR) and the failure to protect the civilians in the area from advancing Serbian forces. *See* BLUE HELMETS, *supra* note 98, at ch. 24. *See also Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, U.N. GAOR, 54th Sess., Agenda Item 42, U.N. Doc. A/54/549 (15 Nov. 1999).

action. The military on a peace operation must be actively engaged in the area of the operation. A neutral force would never use military force against a "party" or former-belligerent. This, however, is exactly what military forces on a peace enforcement mission may be required to do.

With respect to the "perception" of impartiality, the key is to understand the parties involved and be aware of whose impartiality is at issue. Within any peace operation, there will be a myriad of groups and agencies present. These groups could include the various "factions" of the civilians in the area, the almost innumerable NGOs and other private groups providing humanitarian aid, and the various agencies or sub-organizations of the U.N. or NATO. Each of these groups has their own agenda, motives, and goals.[313] The concern with respect to the principle of legitimacy is for the judge advocate to recognize these divergent views and the influence they have on the various military decisions or operations.[314]

Any operation or mission of the military forces on a peace operation will affect many other parties, both directly and indirectly. The judge advocate must ensure that the command questions the reactions of affected parties using both an objective and a subjective approach. Would a third party, looking at the overall mission objectively, conclude that the military is

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[313] The same is true for the members of the military. While not as prevalent an issue, judge advocates must remember that each member of the military (including themselves) bring a certain background and understanding "to the table." This will influence the advice given to the commander by those individuals and their actions during the mission. While deployed to Bosnia and Herzegovina, the author spent more time than should have been necessary trying to convince one primary staff officer that a certain "mission" was impermissible under U.S. law despite the good intentions involved. This obviously is also tied into the second prong of operational necessity discussed above in Section VII(A).

[314] Harnessing the power provided by this diversity is addressed by the principle of complementarity.

favoring one group or another with this action? A subjective analysis will consider the perspective of each party and their reaction; for example, if the military provides this type of assistance to group X, will group Y feel like the unit is favoring group X? If so, are we willing to do the same for group Y? If so, do we provide the assistance to group Y *sua sponte* to prevent any charges of impartiality?[315]

In addition, the principle of legitimacy requires U.S. military on a peace operation to learn and understand local laws, customs, and traditions. Judge advocates, along with other staff sections, such as military intelligence and civil affairs, are key players in developing this knowledge and passing it on to the commanders and soldiers on the mission. The local populace tends to view military forces more favorably and is more likely to support the peace operation itself if those forces know and respect local customs and traditions.

D. Complementarity

The final legal principle of the Law of Humanitarian Operations is complementarity.[316] There are three aspects to consider in the application of this principle: a substantive aspect, a

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[315] Many refer to this analysis as considering the second and third order effects.

[316] Defined as "a complementary relation or situation." COMPACT OXFORD ENGLISH DICTIONARY 301 (2d ed. 1998). The term dates to the early 20th Century and is often used in physics to explain the capacity of the wave and particle theories of light together to explain the phenomena of a certain type, even though each alone accounts for only some of the phenomena. *Id.* This term is also used to refer to the interaction of the jurisdictions of the International Criminal Court and domestic courts. *See* Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/2/Add.1 (1998), *reprinted in* 37 I.L.M. 1002 (1998) (the Preamble states that, "the [ICC] established under this Statute shall be complementary to national criminal jurisdictions."). For further discussion see Lieutenant Commander Gregory P. Noone & Douglas William Moore, *An Introduction to the International Criminal Court*, 46 NAVAL L. REV. 112 (1999); Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the*

procedural aspect, and a political or prudential aspect.[317] In the most basic sense, however, complementarity means that the military force (and other agencies) must work to achieve the mission assigned to it while complementing the work of the other agencies in order to accomplish the overall mission for that peace operation.

Substantively, "boundaries" must exist and the participants must understand their respective "boundaries." In other words, everyone must understand which organization holds primary responsibility for which functions. The foundational legal documents (often the UNSC Resolution) frequently establish which agency holds primary responsibility for the various "functions" or needs of the peace operation as a whole.[318] The responsible agency must accept that responsibility, while working in cooperation with all supporting agencies. Organizations participating in a peace operation frequently range from international organizations, such as the U.N. and its subsidiaries or the ICRC, to non-governmental organizations (NGOs), and military forces. Each of these types of organizations plays an independent, key role, but all are necessary for the accomplishment of the mission. In general, military forces usually work to provide a safe and secure environment, the ICRC and NGO's provide humanitarian assistance, and the U.N. agencies focus on issues such as re-establishing the government and working toward national reconciliation.[319] Judge advocates

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International Criminal Court, 167 MIL. L. REV. 20 (2001); Major Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence*, 167 MIL. L. REV. 156 (2001).

[317] *See Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 248 (1999) (comments by Professor Wexler).

[318] A clear example of this exists in the GFAP, *supra* note 144.

[319] *See generally* BLUE HELMETS, *supra* note 98, at 316. After Somalia, the Secretary-General noted the vital link between humanitarian assistance and assistance in achieving national reconciliation. The former is geared to alleviate immediate human suffering while the later is designed to provide stability for the long term to allow

and military commanders must identify all the agencies involved, the various assigned responsibilities contained in foundational legal documents, and the capabilities that these organizations possess.[320]

Procedurally, complementarity requires the military commanders in a peace operation to set aside the "take charge and get the job done" attitude necessary for combat operations and replace it with a paradigm of close cooperation with other agencies in the area. Any retention of the "combat" paradigm juxtaposed with the many civilian agencies in a peace operation may create tension that affects the effectiveness and efficiency of the mission. To overcome this, the military must strive to recognize the difference in organization and methodologies used by the other agencies. When an issue of responsibility arises, the military commander and the head of the civilian agency must determine which of the relevant agencies has the primary responsibility for accomplishing that aspect of the peace operation and which will fulfill a supporting role.[321] With these facts established, they can better proceed to work together and accomplish the mission.

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the positive impact of the humanitarian intervention to be preserved and recurrence is avoided. *Id.* The general areas in which each agency type work are not exclusive and each may contribute to the different functional areas, for example, the military may contribute primarily by providing a safe and secure environment but may assist in some aspect of humanitarian assistance. Similarly, the United Nations may focus on re-energizing the government, but also provide some help with providing a safe and secure environment by providing oversight of the local national police force.

[320] *See* 1st ID AAR, *supra* note 198, at 34

> The desire to differentiate and distance the military aspects of the process from the civilian aspects caused unnecessary delay in progress. While we must not become the OHR police force or personal guard, closer liaison at MND(N) level would provide a much more cohesive approach to the problems we face and better our chances against those who favor continued strife.

Id.

[321] The united procedural efforts necessary between the military and other agencies can be analogized to the definition of complementarity with respect to the wave and particle theories of light is most obvious. Just as the

The mission in Bosnia and Herzegovina provides a good example of the procedural aspect of complementarity at work. One significant issue addressed by all the agencies on that mission from the beginning deals with the return of refugees and displaced persons to their pre-war residences. The GFAP gives the primary responsibility for this aspect of the peace operation to the United Nations High Commissioner for Refugees.[322] This organization, in recognition of the resources available in the many other agencies in Bosnia and Herzegovina (including the military), holds regular meetings and coordinates the efforts of all concerned to more effectively and efficiently accomplish this task.[323] These meetings greatly assist in coordinating the required humanitarian efforts (provided by international agencies and NGOs), the continuation of a safe and secure environment (provided by SFOR in conjunction with the International Police Task Force's supervision of the local police), and all other necessary aspects to assist these displaced persons return to their homes.

The final aspect of complementarity is the simple application of prudence. Understanding of the interaction between the "humanitarian" aspects of a peace operation (which may or may not include the military to varying degrees) and the military force's

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wave theory and the particle theory of light contribute to the ultimate end (the explanation of the various phenomena of light) without either having the individual capacity to accomplish that end alone, the military and civilian agencies in a peace operation have individual functions and must work together to accomplish the mission. The analogy is not perfect because either the military or the civilian agencies may be able to accomplish the given mission during certain peace operations. It does, however, capture the essence of the principle and recognized the fact that frequently the unique abilities of both the military and civilian agencies are needed to accomplish any given peace operation.

[322] GFAP, *supra* note 144, at annex 7.

[323] See Office of the Staff Judge Advocate, 10th Mountain Division (Light Infantry), Task Force Eagle After Action Review, subject: Refugee and Returns Task Force (n.d.) (copy on file with Center for Law and Military Operations).

mission is vital. Agencies of the International Community and many NGOs present during a peace operation focus on humanitarian action regarding the local populace. The presence of the military forces exists because the UNSC declared that a threat to international peace and security exists and the use of military forces is necessary to defeat it. Time and space may link these various participants, but the link is not likely to always extend to purpose or motive. There is, however, a "link between humanitarian action, which can help restore dialogue between belligerents and pave the way to peace, and political negotiations or the political settlement of conflicts."[324] The interaction between these two approaches at resolving the conflict in the region is a key aspect of the principle of complementarity.[325] Recognition of these sometimes diverging interests helps the judge advocate provide prudent advice for the commander.

E. Application of the Principles of The Law of Peace Operations

Any issue presented to a judge advocate during a peace operation will require consideration of all four principles of the Law of Peace Operations. The framework provided by operational necessity, humanity, legitimacy, and complementarity will assist judge advocates in identifying the significant aspects (both legal and non-legal) necessary to provide sound and timely advice to commanders and staff. The following examples address problems based on the three common issues of humanitarian and civic assistance, detainees,

[324] ICRC SYMPOSIUM, *supra* note 86, at 31.

[325] *See, id.*

and searches and demonstrate the application of the four principles of the Law of Peace Operations.

For the purposes of the following examples, assume these basic facts.[326] U.S. forces are on a peace operation pursuant to authority granted by the UNSC under Chapter VII of the U.N. Charter.[327] A functioning but widely corrupt and ineffective host-nation government exists. Various U.N. agencies are working to assist in re-establishing a working government. The foundational legal documents give the military forces the mission to provide a safe and secure environment to allow the U.N. and other civilian agencies to carry out their humanitarian missions. Primary funding for the mission is the operations and maintenance account of the unit deployed on the mission and no specific funds for humanitarian relief operations are available. The U.S. Forces arrived in country several months ago and the situation in the country is relatively stable.

1. Humanitarian and Civic Assistance

Assume that a commander receives a request from a local orphanage's caretaker for help with rebuilding/repairing the facility. The children have a roof over their heads, but the building needs significant repairs. The commander has the engineer assets and the capability to perform the required tasks. The members of the military unit are very willing to do the

[326] These facts are necessarily brief. Any addition or manipulation of these facts will clearly affect the analysis and likely, the ultimate legal advice.

[327] The UNSC resolution grants the military the authority to "use all necessary means" to accomplish the stated mission.

work. In fact, these soldiers identified several similar projects during their last mission. The judge advocate must provide a legal review of this proposed mission.

The first principle to apply to this scenario is operational necessity. This principle provides that a commander has the authority to use all measures that are indispensable for fulfilling the unit's mission in a peace operation as defined in the foundational legal documents, which are not otherwise prohibited by applicable international or national laws. Does the repair of an orphanage fit within the military mission as stated in the operations order and other foundational legal documents? If so, then the judge advocate must continue the analysis using the other principles of humanity, legitimacy, and complementarity. If it does not, then the judge advocate must complete an analysis of the project using the provisions of applicable U.S. fiscal law.[328] If this repair project does not meet the specific fiscal law requirements, as is likely under the facts provided, then application of this principle will prohibit the project.

Consideration of the principle of humanity is not exceptionally helpful on this particular issue, but still should be examined. Humanity in a peace operation means that a military unit is limited in the means it may use to accomplish the mission and must at all times respect and protect the fundamental human rights of the populace in the area of operations. Unless there is evidence of systemic discrimination of the children, none of the fundamental human rights under international law is at issue. Consideration of the general principles of a civilized people may operate to encourage the unit to work on finding a way to help, even if simply ensuring that appropriate agencies know of the problem.

[328] See discussion *supra* note 208 and accompanying text.

An analysis of this proposal under the principle of legitimacy will encourage the judge advocate and the commander to focus on the impartiality requirement. Impartiality is a matter of practice and perception. If the commander is able to perform the mission after applying the principles of operational necessity and humanity, is he/she willing to perform similar missions for all such requests or for an orphanage that serves members of "group X?" In addition, how will the local population perceive this repair project? Initially it might appear that everyone would support it and appreciate such a project. After consideration of the competing interests of all the parties in the area, however, it is very likely the project might offend people of "group X," especially if the orphanage only takes or has children from "group Y." Resolving these questions is not easy and requires "fact gathering" and thoughtful analysis.

The final principle that the judge advocate and the commander must consider is complementarity. Does the military have primary responsibility for conducting this type of project in this area? If not, the unit should first coordinate with whichever civilian agency has "the lead."[329] Depending on the level of activity by NGOs and other agencies, this orphanage may already be on a list of projects due to be completed. Are there other agencies more suited to the task than the U.S. military? Is a joint project either permissible or possible? Application of this principle will ensure that the commander and staff considers all

[329] There is also some overlap in this analysis with required inquiries under operational necessity, for example when considering if this project would constitute permissible humanitarian and civic assistance, the unit must ensure that it does not duplicate other economic assistance by the U.S. (primarily projects managed by the Department of State. *See* DoD DIR. 2205.2, *supra* note 208.

potential players in the area during the analysis and includes them as necessary to most effectively and efficiently accomplish the mission.

2. Detainees

The second issue commonly dealt with in peace operations is the detention of civilians. Often the judge advocate must advise the commander regarding the development of a command policy that addresses the detention of civilians in the area of responsibility. In order to accomplish this task, the judge advocate must analyze the command's proposed policy using the principles of operational necessity, humanity, legitimacy and complementarity.[330]

Operational necessity is, once again, the threshold issue, and commanders must make this determination before all others. In all likelihood, the detention of civilians in the area will be necessary for the military to accomplish its mission. This necessity may arise from operational needs, such as force protection and the need to maintain a safe and secure environment, or from the authority to exercise police powers as U.S. forces did in Kosovo.

If an operational need exists, the inquiry turns to whether applicable international or national laws prohibit the force from making such detentions. International law frequently

[330] These principles would also apply to making determinations in individual cases and, if used appropriately, will assist the judge advocate in providing legal advice or with making the decision if he/she exercises release authority.

provides the authority for U.S. forces to detain civilians[331] and influences the standards applicable to those detentions.[332] Judge advocates must also consider both the national law of the U.S. and the host nation. The requirements of "probable cause" and other similar concepts of U.S. criminal law do not apply as a matter of law to foreign civilians during peace operations. These requirements may, however, assist in developing a detention policy and clearly interact with the principle of humanity and help to address the fundamental human rights of the potential detainees. Host nation law also influences the analysis required before detaining civilians in a peace operation. Changing the length of detentions permitted before a judicial review was required in Kosovo provides a great example of this application of host nation law.[333]

Applying the principle of humanity to a detention policy reminds the commander and all military members that even though the authority to detain civilians exists, this authority is not without restrictions. These restrictions may arise from the command's prior analysis of the applicable local laws. They may also derive from the fundamental human rights of the civilians in the area. Commanders must understand that detentions may not be arbitrary. This restriction prohibits "mass" detentions and requires the existence of information specific to that individual that justifies detention. Fundamental human rights also generate the need for a relatively quick review of the detention to ensure that it is justified and necessary. In addition, the fundamental human rights of the detainees also influence the standards for the

[331] One example is the "all necessary means" language in a U.N. Security Council resolution.

[332] The principle of humanity addresses this aspect.

[333] *See* discussion *supra* note 253.

detention facility. The military must provide for the detainee's basic needs and treat them humanely.

Once the commander's policy passes the principles of operational necessity and humanity, the judge advocate must examine it under the principle of legitimacy. This principle reminds the military forces that they must be impartial in the performance of their duties. Since the background to a peace operation frequently includes an armed conflict, a tendency may exists to divide the civilians into "good guys" and "bad guys," or "aggressors" and "victims." As a legal principle in peace operations, legitimacy requires the military to always act with total impartiality. This is especially true when exercising the authority to detain a civilian. Detention must be conduct based, not status based. The perception by other civilians in the area of operations is a vital consideration. If they believe that U.S. forces favor one particular group, then members of the other group will not cooperate and will likely increase tensions. Therefore, the commander's proposed detention policy must appear to fairly and impartially apply to all civilians regardless of group affiliation.

Finally, the judge advocate must consider the principle of complementarity. This principle requires the commander to analyze whether other agencies (host nation and international) have the authority to detain civilians for the same conduct used by the military to justify detention. If so, a number of questions arise. Is the joint exercise of this authority possible? Which agency will bear primary responsibility for certain aspects of these detentions, such as the impartial review? Will the U.S. military be able to interact with these agencies and share information so that they can accomplish the mission more efficiently and

effectively? Recognizing the potential assistance of other agencies greatly helps the commander develope the best possible detention policy.[334]

3. Searches

The third common issue faced in peace operations is conducting searches of civilians and/or their property. Often the judge advocate must advise the commander when developing a command search policy.[335] Once again, the judge advocate must analyze the commander's proposed policy by using the principles of operational necessity, humanity, legitimacy, and complementarity.

When examining the principle of operational necessity, the judge advocate must first determine whether the military unit has a specific need to conduct searches of the civilians or their property. Certain circumstances would clearly provide such an operational need. This would include searches upon the entry to or exit from U.S. base camps or searches pursuant to an authorized detention. Other justifications used in past operations, which will likely repeat themselves, include searches for military weapons or equipment or other evidence of a threat to the safe and secure environment.

[334] The policy will also benefit from this analysis by identifying potential obstacles presented by other agencies, not just assistance.

[335] As with detainees, an analysis using the four principles will assist in making a proper determination in individual cases also.

Once a specific need to conduct searches exists, the judge advocate must look to the second prong of operational necessity. This prong requires an analysis of applicable international and national laws that may prohibit these searches even though the commander may deem them necessary. As with detentions, applicable international law would likely serve to provide the legal authority to conduct the searches in furtherance of the mission, not prevent them. It would also, however, provides certain fundamental human rights, which prevent the unfettered exercise of this search authority. As with detentions, the requirements of "probable cause" and other similar concepts of U.S. criminal laws do not apply as a matter of law to foreign civilians during peace operations. These concepts do, however, interact with the principle of humanity and the application of fundamental human rights and may assist in developing a policy regarding searches. Host nation laws also may influence the conduct of any searches by U.S. military forces. The judge advocate must determine if the country has requirements similar to those in the U.S. that protect the citizens against unreasonable searches of their persons or property. If so, he/she must determine if those protections are applicable to U.S. forces in this operation.

The judge advocate turns next to the principle of humanity. Consideration of the principle of humanity serves to remind the commander and all U.S. forces that limits exist on the conduct they can use to accomplish the mission. These limits include certain fundamental human rights possessed by the civilians in the area of operations. While none of the specific fundamental human rights strictly apply to the conduct of searches, there are notions or principles applicable in a civilized society that do help the judge advocate and commander address the bounds of a search policy. The notions of liberty, justice and a

reasonable expectation of privacy in one's own home and person clearly apply in this situation. While the legal standards in U.S. law are not applicable per se, they may serve to help the judge advocate and commander recognize that respect for others is a necessary consideration. Use of restraint in conducting searches will also likely help to prevent antagonizing the local population and advance the respect of the rule of law.

Once the judge advocate determines that the policy does not violate the principles of operational necessity and humanity, the analysis turns to legitimacy. To maintain an appearance of legitimacy to the local population, any policy or exercise of the authority to conduct searches in a peace operation must be impartial. The history of the area of operations frequently includes an armed conflict, and may provide the basis to divide the civilians into "good guys" and "bad guys" or "aggressors" and "victims." As a legal principle in peace operations, legitimacy requires the military to act with total impartiality. A search of either a person or property must be conduct based, not status based. A mass search of an area based upon nothing other than a general suspicion is not justifiable and will likely increase tensions and de-legitimize the U.S. military's presence and the peace operation as a whole. The perception by the civilians in the area of operations is a vital consideration. If they perceive that U.S. forces favor one particular group, then members of the other group will not cooperate and will likely increase tensions. Therefore, the commanders proposed search policy must appear to fairly and impartially apply to all civilians regardless of group affiliation.

The final consideration a judge advocate must apply is the principle of complementarity. In this analysis, the impact of the authority and effectiveness of other responsible agencies is considered. Many issues arise in this context. Do other agencies, international or host nation, have the authority to conduct searches in the area of operations? If so, will these agencies share the authority? Will one exercise primary authority? Will these agencies share information in order to accomplish the mission more effectively? If so, how will they accomplish this?

The application of these four principles of the Law of Peace Operations assists the judge advocate in analyzing complex legal questions during a peace operation. The multi-faceted nature of these issues and the different parties create a situation that requires a methodical consideration of all competing influences, both legal and non-legal. The principles of operational necessity, humanity, legitimacy, and complementarity offer a practical framework that will allow a judge advocate to provide competent and timely legal advice to the commanders and staffs regarding these complex questions.

VIII. Conclusion

The complex nature of the modern peace operation mission derives from the wide variety of environments, mission types, and actors. These factors coupled with a relative void of guiding legal principles creates a "fog" for the commander that is different, but no less uncertain than that experienced in a war. Few clearly delineated yes/no answers occur in the realm of legal issues during a peace operation. A set of guiding legal principles will assist

the commander and the judge advocate in analyzing the situation and the applicable law, thus helping them to accomplish the mission. These standards, however, cannot be so flexible as to be meaningless and leave the commanders and soldiers guessing about their responsibilities.

Operational Necessity, Humanity, Legitimacy, and Complementarity are legal principles that help to establish the parameters that define legal conduct for U.S. forces during a peace operation. They do not supplant existing laws, but provide a clear framework or context that judge advocates may use when analyzing common issues in a peace operation, issues which require a complicated analysis of both legal and non-legal aspects. These four principles will help to frame the judge advocates thought process, whether in the "office" or sitting at one of those meetings at two o'clock in the morning. The judge advocate can answer the commander with confidence, knowing that he/she will present all the pertinent factors to the commander before a decision.

In 1952, Professor Lauterpacht said that the Laws of War were at the vanishing point of international law. In 2001, while the Law of War still occupies the outer edges of international law, the Law of Peace Operations has replaced it as the vanishing point of international law. By applying the principles of operational necessity, humanity, legitimacy, and complementarity, the judge advocate face with a pressing question at one of those early morning meetings, will have a ready framework by which to tether his/her advice and avoid slipping in the fog of law that now surrounds peace operations.